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Pittsburgh Legal Journal.

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Orphans' Court,

ALLEGHENY COUNTY.

In re Estate of MARY O'H. SPRING, Deceased.

Will—Trust—Accumulations—Income.

Testatrix devised one-fourth of her residuary estate to four grandchildren, and directed that the devise should be subject to the following conditions: that it should be held by my daughter A during her life to have the sole control and management and to collect and receive the income therefrom, and pay out at her discretion from said income to the said children, such amounts as she the said trustee may from time to time deem for their best interests.

Held, that the only lawful purpose for which the trust was created was to give the trustee the control and management of the devise and discretionary power over the income during the minority of the devisees, and as each reached majority the trust fell as to such child.

No. 157 January Term, 1906.

Opinion by OVER, J. Filed April 17, 1906.

The decedent in the sixth paragraph of her will divided her residuary estate into three parts and devised one of these parts to her four grandchildren, "Guilelma Fell Alsop, Reese Denny Alsop, Mary Alsop and Elizabeth Febiger Alsop, children of my deceased daughter, Mary Lee Alsop, and their heirs and assigns forever, who shall take and hold the same share and share alike."

She further directed that this devise should be subject "to the following conditions," namely "that it should be held by my daughter, Anna Melazina Spring during the lifetime of my said daughter Anna Melazina Spring, ... to have the sole control and management . . . . and to collect and receive the income therefrom and pay out at her discretion from said income to the said children . . . . . or their heirs, according to their respective shares, such amounts as she, the said trustee, may from time to time deem to be for their best interests;" and gave the trustee power to terminate the trust at her discretion. The trustee accepted the trust and this petition is filed by Reese Denny Alsop who has become of age, for the purpose of having the trust as to him terminated.

That active duties are imposed upon the trustee by the terms of this will is clear; but that is not enough to sustain the trust, if its lawful purposes have been accomplished. In *Kunzelman's Estate*, 136 Pa. 151; it was said by Mr. Justice Clark, that "It is immaterial that the trust imposed active duties upon the trustee. These duties are only subsidiary to the main purpose; they are mere incidents or adjuncts to the trust; and if the trust itself falls these active duties are dispensed with, they will not uphold the trust, they fall with it."

Here the petitioner was given a fee by the terms of this will, subject only to the power given to Miss Spring to manage the estate and collect the income, and the trust was evidently created for the purpose of giving her discretionary power over the income. and if she could legally exercise that power after the petitioner had reached his majority the trust must be sustained. But as the act of 18th of April, 1853, Sec. 9, prohibits the accumulation of income except during the minority of the benificiary, she has no discretion as to withholding it from the petitioner, if she continues to act she must pay it to him, there is no reason why the trust should be sustained, the purpose for which it was created ceased to exist by reason of the prohibition against accumulations, and the trust falls. The petitioner is therefore entitled to the actual possession of the estate

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devised him, and the prayer of his petition must be granted.

Let a decree be drawn accordingly.

In re SAME.

No. 157 January Term, 1906.

Opinion by OVER, J. (EXCEPTIONS TO DECREE) Filed June 9, 1906.

It is contended by counsel for exceptant "that the obvious purpose of Mrs. Spring was the protection of her grandchildren from their own improvidence; a protection, which when necessary as to income is a *fortiori* a necessity as to *corpus*." There is no intimation, however, in the will that this was her purpose, and had she intended to create a spendthrift trust in the sixth paragraph, she would no doubt have done so in as apt words as were used in the fourth, in creating such a trust for one of her daughters, and the fact that she did not, rebuts any presumption that she intended to create a spendthrift trust in the sixth paragraph.

If, as claimed, one of the purposes of this trust was to give the trustee the control and management of the estate devised to the petitioner, we think the purpose is not a valid one. It is well settled that "even a clear intention of the testator cannot be permitted to contravene the setted rules of law by depriving any estate of its essential, legal attributes;" *Good* vs. *Fitchthorn*, 144 Pa. 292. Here, by the will, a fee vested in the petitioner subject to a provision as to the control and management of the devise, and the payment of the income, but as to the latter, the testatrix has no longer discretionary power; the devise, therefore, is now subject only by the terms of the will to its control and management by the trustee; and as one of the essential, legal attributes of the estate vested in this petitioner is its control and management, the testatrix could not deprive his estate of this attribute.

As a fee is vested in the devisee the testatrix cannot restrain the alienation of the land, he could therefore sell it; it would be bound by a judgment against him and could be sold on an execution, and his or the sheriff's vendee would be entitled to possession. If the trust then could not be sustained as against his vendee, surely it cannot be as against him. Moreover, no one but this petitioner has any interest in the estate devised to him, and it is against the rule of public policy to restrain him in its use or disposition; *Shallcross Estate*, 200 Pa. 125.

In all the cases cited by counsel for exceptant there is a well defined and legal purpose, which sustained the trust. Thus in *Krebb's Estate*, 184 Pa, 222; the devise was subject to the condition that the devisee should "only receive the interest of his share or so much as in times of sickness or accident the executors will give him to meet his wants;" and as said on p. 226 "The testator seems. . . . to have foreboded the thriftless character of his son, and therefore substituted the discretion of a trustee as to the manner of the use of the estate . . . . . The plain and lawful purpose was to prevent his son from coming to want, and for this it was essential that title should be in the trustee." In *King's Estate*, 210 Pa. 439; it was held, that "The natural and obvious purpose was the protection of the testator's son and his family from his improvidence;" and had the trust not been sustained there, the son would have been excluded from any interest in his father's estate and been dependent on his children's bounty for his support. In *Franz* vs. *Race*, 205 Pa. 152, the court said: "Neither is there any force in the argument that because there is no devise over at John's death, he must take more than a life estate. By the will there is no devise of the land to him, the income and profits are hedged around with a trust obviously to guard against his mismanagement and improvidence." In *Shower's Estate*, 211 Pa. 297; the testator gave the estate to trustees to invest and control the same so that his sons and daughters "may enjoy the interest thereof only, but in no way impair or diminish the principal." The court said, p. 305, "We are of opinion that Frederick A. Shower, by his will, limited and restricted the use of the estate he gave his three children so that they could enjoy only the income thereof and without the right of anticipation, and not subject the claim of their creditors, in the hands of the trustee." In all of these

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cases the trusts were sustained as spendthrift trusts. In *Sharpe's Estate*, 155 Pa. 289; the persons entitled to the corpus could not be ascertained until the expiration of the trust.

On p. 293 the court said: "We have by the original will a trust to pay income to Rolland and Fannie during the life of Elmira. and at his death to make distribution of the principal to them solely or in equal shares with two others, as may then be determined by the circumstances set forth in the will." Here there is no uncertainty as to the beneficiaries. In *McIntorsh's Estate*, 158 Pa. 528; there were different purposes to which the trustees in their discretion might apply the income of the trust estate and some of the beneficiaries were minors; on p. 536, the court said: "The scheme of the trust declared gave these trustees a large discretion and necessarily imposed on them active duties. They were empowered in case of necessity from sickness of any of the heirs of E. G. McIntorsh, deceased, or should any of the children of L. J. McIntorsh, deceased, be desirous of a collegiate or classical education, to use the income of this share. . . . . ." It will thus be seen that the income of the whole of this share is pledged for defrayal of expenses which may become necessary in case of sickness of any one of the heirs of E. G. McIntorsh, deceased, or the education of either of the children of L. J. McIntorsh, deceased, until the youngest attains majority. An adequate reason for the creation of this trust is found in the minority of two of the heirs of the *Cestui que Trustent*, either of whom may become entitled to the benefits; and an additional reason is suggested by the evident belief of the testator, whether justified by facts or not is immaterial, that the industry and sobriety of the other needed to be tested by time." Here the only purpose of the trust as to the income is to give the trustee discretionary power over it.

In *Harris* vs. *Harris*, 205 Pa. 460; the devise is to the executors, in trust to hold the same, to divide the rents and profits amongst the children, with power to sell when the children agreed to a sale, and it was held that the trust could only be terminated by the consent of the children. Here the trustee has no power of sale and the beneficiares take the land itself.

In the other cases cited the purpose was to preserve the corpus of the trust estate for remaindermen. Here there are no remaindermen, the fee being vested in the petitioner.

We think the only lawful purpose for which this trust was created was to give the trustee the control and management of the devise and discretionary power over the income during the minority of the devisees; and as the petitioner has reached his majority, the trust as to him falls. As the two judges who heard the argument on the exceptions are divided in opinion, they are dismissed.

DECREE.

And now, June 9, 1906, this cause came on to be heard upon exceptions to decree, was argued by counsel, and upon consideration thereof the exceptions are dismissed.

In re SAME.

No. 157 January Term, 1906.

Opinion by MILLER, J. (DISSENTING.) Filed June 6, 1906.

Testatrix made her will October 27, 1903, she died March 2, 1904; the petitioner became of age March 7, 1905. The objects of her bounty are her two daughters and the children of a deceased daughter; having in mind the differences between their respective conditions she made distinct and careful provisions with reference to each. To her daughter Anna Meluzina Spring she gave her homestead; all her personal property and one-third absolutely of the residue of her estate; for her daughter Elizabeth she provided the income of another third of her estate, carefully preserving the principal under the discretion of her daughter Anna, with the remainder of the principal over to Anna and the children of her daughter Mary. For these children who were all in their minority when the will was made, and some of whom so remain she had in mind a still different and distinct provision, to wit,—that they should have one-third of the rest and residue of her estate subject to the *condition* that enjoyment of the possession of the principal thereof should be postponed until such time as her daughter Anna, in the exercise of the discretionary power vested

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in her as trustee, thought it for their best interest to turn over the corpus by a deed or release. During this period of postponement their estate was to be held in trust for their use, the trustee to perform the active duties of management and control, collection and disbursement of income, necessarily including the payment of taxes, the making of repairs, and all other duties incident to sole control and management of improved real estate.

It may be conceded that the discretionary power in the trustee to accumulate income if exercised for that purpose, is in violation of the provisions of the statute, but it does not follow that by reason thereof the entire trust shall be stricken down; that portion thereof may be declared void but the trust may still remain; *Brook's Estate*, 140 Pa. 84; as to the trust estate distinctly given, with limitations, conditions and powers not in violation of law they should be sustained; *Ingersoll's Appeal*, 86 Pa. 240; cited in *Sharp's Estate*, 155 Pa. 289, and *Edward's Estate*, 190 Pa. 177.

I cannot agree that the purpose of this trust was to accumulate income; if such were the purpose it would have been expressed in mandatory terms instead of being left to the discretion of the trustee. On the contrary, the purpose of this devise to these grandchildren, then in their minority, was to throw about their estate, the intervention of a trustee, in whom the testatrix had full confidence, postponeing as she had a proprietor's right to do, enjoyment of the possession thereof until such time as in the judgment of the trustee they might safely be vested with the sole control thereof themselves; this postponement of possession in no event to extend beyond the lifetime of the trustee.

Discretionary power to accumulate income is a mere incident of this trust; the primary intent and the condition of the devise is, supervision thereof by one in whom she apparently had the highest confidence, who would act for the best interests of these beneficiaries. The control and management of the estate for the minors' best interests are the prominent and mandatory features of the trust; this intent of the testatrix is clear, and it must be maintained unless it is contrary to public policy or in violation of some principle of law; neither of which appears here. Her obvious purpose was to protect her grandchildren's estate from their own imprudence or inexperience.

If the fact of a gift of income only and the interposition of a trustee implies distrust; *Stambaugh's Estate*, 135 Pa. 585; does not the fact of trusteeship here, indicate that testatrix, for reasons best known to herself, most likely the youth, immaturity, and inexperience of her grandchildren, believed it was not best for them to have control of the estate devised, until such time as they would be able to conserve and preserve the bounty intended for them?

It may be conceded that this is not a spendthrift trust and it is clear that these grandchildren were to be the beneficiaries both of the income and the principal of the estate devised to them; if this were all the trust should be terminated. But there are active duties enjoined; a number of them come within the limitations which require the upholding of the trust as set forth in *Perry on Trusts*, Sec. 305; and in *Barnett's Appeal*, 46 Pa. 392. In addition there is the manifest purpose to withhold actual possession of the corpus of the estate until a future period; a trust *pur auter vie* should be sustained, equally, with an estate *pur auter vie; King's Estate*, 210 Pa. 435.

The trust is as active as was the trust in *Krebb's Estate*, 184 Pa. 232. The duties to be performed by the trustee are similiar so far as collection of rents, taking of possession, payment of taxes and insurance, keeping up of repairs, and disbursements of income, as they were in *Franz* vs. *Race*, 205 Pa. 150; it should be sustained because it serves a useful and lawful purpose; *Little* vs. *Wilcox*, 119 Pa. 439; because it does not in terms or by necessary implication require permanent accumulations of income; *Hibb's Estate*, 143 Pa. 217; and because it is necessary for the accomplishment of testatrix intent and purpose.

For petitioner, *George W. Guthrie.*

For respondent, *Patterson, Sterrett & Acheson.*

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Court of Common Pleas No. 3,

ALLEGHENY COUNTY.

EQUITABLE BUILDING & LOAN ASSOCIATION vs. THOMAS et ux.

Sheriff's sales—Junior lien—Purchaser owner of first lien—Release of first lien—Building and loan associations—Bidding on loans.

A gave a mortgage to B, and subsequently sold part of the property to C, who executed a mortgage to D. D bought B's mortgage and foreclosed his own laying in the property. A claimed that thereby the mortgage originally given to B was satisfied. Held, that the B mortgage still remained open.

The sale that where the owner of a mortgage purchases the property on a junior lien, the original mortgage is satisfied, does not apply to a purchase of part of the property which had been sold to a third party.

A executed an order directing part of the proceeds of a building and loan mortgage to be paid on account of premiums. Held, she was estopped from setting up the defense that she had not authorized a bid of a premium for the money.

Nos. 161 and 163 August Term, 1904.

Opinion by EVANS, J. Filed July 5, 1906.

This is an application to open a judgment entered upon a bond accompanying the mortgage executed by the defendants to the plaintiff Building and Loan Association, and now assigned by the plaintiff Association to the Farmers and Mechanics Building and Loan Association. Subsequent to the execution of the bond and mortgage in question the defendants sold a part of the property covered by the lien of the mortgage, and the purchaser of that property executed a bond and mortgage to the Farmers and Mechanics Building and Loan Association, the use—plaintiff in the judgment in dispute. Default was made on the mortgage to the Farmers and Mechanics Association, foreclosure had, and the property bought in by the plaintiff. Prior to the sale of the property on the judgment recovered by the Farmers and Mechanics Association, it purchased the judgment entered upon the bond accompanying the mortgage given to the Equitable Building and Loan Association by the defendants in this case. The ground upon which defendants ask to have the judgment opened is first, that in the purchase of a part of the property covered by the judgment at bar on a junior lien, the Farmers and Mechanics Association is compelled to satisfy the judgment entered upon the bond accompanying the mortgage given by the defendants to the Equitable Building and Loan Association; and second, that in the mortgage given to the Equitable Building and Loan Association there was no bidding for the money at the time the money was loaned by the Equitable Association to the defendants, and therefore the $1,200 premium charged is usury. The proposition that the purchase of only a part of the land covered by the mortgage to the Equitable Building and Loan Association by the assignee of that mortgage at a sheriff's sale had upon a junior encumbrance satisfied the mortgage to the Equitable Bnilding and Loan Association, is not sustained by the authorities cited by the petitioner. If the identical land which is subject to a mortgage is bought at sheriff's sale on a junior encumbrance by the mortgagee of the first mortgage, that purchase would satisfy the first mortgage, because the purchaser at a sale upon the junior encumbrances takes the land subject to the first mortgage, and the payment of the first mortgage is a part of the consideration. But the courts of this state have never held, and we are of the opinion that they never will hold, that where a mortgage is given upon a tract of land and subsequently that land is divided and becomes the property of two different owners and the property of one is sold upon a judgment which is junior to the lien of the mortgage covering the entire tract, if the owner of the mortgage covering the entire tract purchase the property at sheriff's sale, he not only satifies the mortgage on his own property but satisfies that on his neighbor's property. This is the contention here on the part of the defendant, and it is not sustained either by decision or principle.

The question as to whether the amount charged as premium by the Equitable Building and Loan Association in its loan to the defendants is usury depends upon the question whether there was bidding done on

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behalf of the borrower when the loan was made by the Association, and this is a disputed question of fact. George W. Flowers, Esq., a member of this bar, and who was at the time attorney for the Building and Loan Association, testifies that he was authorized by the defendants to bid for them at the sale of the money of the association, and that he did so bid, and the premium charged was the premium that he bid. The fact that he did bid and that he bid the amount of the premiums charged is not denied, but it is denied by Thomas and his wife that Flowers was authorized by them or by others for them to represent them and bid for the money. Subsquent to the making of the loan and the execution of the mortgage, Mrs. Thomas signed an order directed to the Equitable Building and Loan Association giving it directions how to pay out the proceeds of the loan which the Building and Loan Association had made to her. This instruction was in writing, signed by Mrs. Thomas, and witnessed by her husband, and directed the Building and Loan Association to appropriate of that loan the amount of $1,200 to premiums bid for the loan. If, as a fact, Flowers did bid for Mrs. Thomas without authority, then her subsequent conduct is a ratification of his agency, and she may not now set up the fact that Flowers in assuming to represent her in bidding for this loan was not her authorized agent.

Rule to open judgment is discharged.

For plaintiff, *George W. Flowers.*

For defendant, *Schoyer & Hunter.*

(Common Pleas No. 3, Allegheny Co.)

PRENTER vs. KEELING and RIDGE.

Negligence — Building operations — Obstruction on sidewalk.

B, while laying a pipe line piled paving stones on the edge of the sidewalk. One stone was on the sidewalk, and A while walking along fell over it and was injured. It did not appear that B placed the stone on the walk, but it did appear that B removed all the stones from the street. Held, that the question of B's negligence was for the jury.

No. 148 February Term, 1904.

Opinion by EVANS, J. Filed March 10, 1906.

The evidence discloses the following state of facts as found by the jury:

The defendants on the day of the accident were constructing a pipe line on Penn avenue, in the city of Pittsburgh, and, for the purposes of construction, had the street opened between Thirty-first and Thirty-second streets, with the paving stones piled along the outer edge of the sidewalk. The plaintiff, at about 7 o'clock in the evening, was coming along Penn avenue towards the city, and, when walking between the row of paving stones and the houses fronting the street, her foot struck a block of paving stone lying on the sidewalk between the pile and the house, and she fell and injured herself. There was some evidence that there were no lights at the place where the accident occurred; but the plaintiff knew that the paving stones were piled along the sidewalk, as she had walked for something over half a square between the pile of paving stones and the house line. The only evidence of negligence was the fact that one of the paving stones taken from the street by the defendants was allowed to lie loose on that part of the pavement between the pile of paving stones and the house line, and the only part on which the pedestrian could walk. There was no evidence as to how the paving stone got down on the pavement other than the general testimony that all the paving stones had been removed from the street by the employes of the defendant company.

We think the question of the defendants' negligence was for the jury. The evidence showed that the paving stones had been removed from the street by the defendants' employes. Whether this particular stone, which occasioned the injury to the plaintiff, had been carelessly left in the passageway left for pedestrians, or whether it had been taken from the pile of stone by some mischievous or careless boy, or whether it had been so insecurely piled when it was placed with the other paving stones that it fell off onto the pavement, we have no evidence to determine. But the defendant was occupy-

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ing that part of the street which is ordinarily used for pedestrians, and while, with proper care, he had a right to occupy it with the piles of paving stones, it was his duty to exercise all resaonable care to protect passersby whose rights were higher than his. It was not enough that he should pile the stones along one side of the pavement and then pay no further attention to them, for he knew that mischievous persons might interfere with them; he knew that individual blocks of stone might be jarred out of place; and it was his duty to exercise reasonable supervision to see that the pile of stone should not become dangerous to passersby. There is evidence that he had a watchman whose duty it was occasionally to walk along the street to see that the pile of stone was all right. Whether he exercised proper care in this inspection was a question for the jury, and the jury has found against the defendant. This happened in the early part of the evening when the street is naturally occupied by persons walking on the sidewalk, and during that time it was particularly the duty of the defendant to see that the place left for pedestrians was kept clear.

We think this case was ruled by *Beck* v. *Hood*, 185 Pa. 32, where a person was injured on a part of the sidewalk which had been rendered dangerous by the defendant and where he had barricaded the way, but the pole which he had placed there had been removed.

The Supreme Court say: "It would not be enough for a builder to fence off part of the walk because it was in a dangerous condition, and then give it no more attention. He knows the probabilities of the removal of the barrier by mischievous or disorderly persons, and should exercise reasonable care to see that it is in place. It might not be necessary to maintain a watchman at the spot during the night, but the builder should give some attention to this subject during the evening and while the walks are actively occupied, in order to be sure that the lights and barriers he has provided to protect the public are in place and doing their work. How well this has been done in this case was for the jury."

We think the principle laid down in the above quotation rules the only question involved in this case.

New trial refused.

For plaintiff, *C. A. Polk.*
For defendant, *Stone & Stone.*

Court of Common Pleas,

WASHINGTON CUONTY.

HOLLISTER vs. HOLLISTER.

Divorce—Desertion—Proof of marriage.

Libellant filed petition for divorce a *vinculo matrimonii* on the grounds of desertion. Service was made on respondent on a return of two *nihils* and publication. Proof of marriage was made by libellant and several witnesses. Libellant proved desertion from August 19, 1889, to date of taking testimony. On objection that the proof of marriage was not sufficient and wilful and malicious desertion not shown, held sufficient and divorce granted.

No. 90 February Term, 1906.

Opinion by TAYLOR, J. Filed July 5, 1906.

The libel filed in this case, December 26, 1905, sets out all the jurisdictional facts and for cause of complaint alleges that the respondent, the husband of libellant, "on the 7th day of August, 1899, wilfully and maliciously, and without reasonable cause, deserted libellant, and hath absented himself from her habitation, and hath continued in said wilful desertion during the space of two years and upwards, to wit, from August 7, 1899, thence hitherto, and avering further that at the time of filing same that the address of the respondent is unknown. No service was had for this reason on the said respondent and notice was given by publication of the time and place of taking testimony *ex parte* libellant after returns of *non est.* During the taking of the testimony before a commissioner appointed by the court the respondent on May 7, 1906, appeared by counsel and afterwards in court at the argument asks to have noted the following exceptions, to wit:

1. The evidence of proof of marriage is not sufficient.

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2. Wilful and malicious desertion are not shown.

The first objection cannot under the evidence be sustained.

The wife is a competent witness to the fact of marriage, if it be a fact, and in this case the libellant testifies that she is 44 years of age and that the respondent is her husband to whom she was married at Plumer, Venango county, Pa., January 14, 1885, by the Rev. Rice, a Methodist minister, at the pastor's residence, and from that date to August 19, 1889, they lived together as husband and wife when the respondent deserted her and she has not seen him since, nor has he contributed since his desertion of her anything towards her support. She says she knows of no cause for his leaving her and her two living children of which he is the father and also of the three deceased.

While it is true the marriage of a man and woman must be established as a fact before there is any relation for the statute to take hold of, it is also true that absolute proof of the marriage is not required; cohabitation, reputation and general surroundings indicating the reasonable probability of the conclusion that the parties were married, are recognized in *Dunning* v. *Hastings*, 183 Pa. 210, as being sufficient evidence to establish that fact. All these facts are conclusively shown by the testimony of witnesses called by the libellant, her neighbors and acquaintances who were famaliar with the family and social relations of this libellant and respondent. If all this left the court in any doubt upon the question of a marriage between these two persons, which they do not, we would be confronted with the libellant's testimony, and she testifies to a marriage with this respondent, giving date, place and name of the officiating denominational clergyman. There is not a word on the record contradicting her or the witnesses called in support of this averment of her marriage to the respondent, and we must hold the fact of the marriage of these parties as established by competent evidence: *Brinckle* v. *Brinckle*, 12 Phd. 232.

The second objection must be dismissed. The desertion seems to us to be wilful and malicious and persisted in continuously since it began on August 7, 1899. Under the testimony there was an actual abandonment of matrimonial cohabitation, with an intent to desert, and this persisted in, without cause, for upwards of seven years, during which time the libellant has not received word or aid from the respondent or known his whereabouts with any certainty. Here are many essential facts shown from which the law will infer guilty intent which is alone manifested when without cause or consent either party withdraws from the residence of the other: *Ingersoll* v. *Ingersoll*, 49 Pa. 249; *Middleton* v. *Middleton*, 187 Pa. 612.

There being sufficient proof of the fact of a marriage and an actual abandonment of matrimonial cohabitation without cause for more than two years as shown by the relevant testimony in this case, there is but one conclusion to draw from the finding of these facts, and that is that the abandonment, etc., was with an intent to desert and that it was and is wilfully persisted in. The libellant has sustained by evidence the averments of her libel and is entitled to a decree divorcing her from the bonds of matrimony entered into with the respondent.

For libellant, *Byron E. Tombaugh.*

For respondent, *R. W. Parkinson.*

[From Harry Russell Myers, Esq., Washington, Pa.]

A deduction that declarations were made under a sense of impending death, without hope of recovery, is held, in Gipe vs. State (Ind.) 1 L. R. A. (N. S.) 419, to be warranted, although they were made several hours after the statement of the declarant that he did not believe he could get well, he having grown continually weaker in the meantime.

That nonresidents may be denied permission to act as executors of local estates is affirmed in Re Mulford (Ill.) 1 L. R. A. (N. S.) 341. The right of nonresidents to act as executors or administrators is considered in a note to these cases.

The right of a woman residing with her husband to maintain an action for the enticement of her minor child is denied in Soper vs. Igo, Walker, & Chenault (Ky.) 1 L. R. A. (N. S.) 362.

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TORTS. (FALSE IMPRISONMENT.) ME.

In Rush v. Buckley, 61 Atlantic Reporter, 774, a person who had been arrested for violation of a municipal ordinance and committed to jail for failure to pay a fine for such violation sued the judge of the municipal court who issued the warrants, the officer who served them and the person who made the complaints, for false imprisonment, upon the ground that the ordinance had never gone into effect and was void because it had never been published as required by law. The decisions as to the liability respectively of the person who made the original complaints and of the officer who served the warrants are founded upon fairly well-settled principles of law, and are to the effect that, where a person does no more than prefer a complaint to a magistrate in a matter over which the latter has general jurisdiction, he is not liable in trespass for false imprisonment for the acts done under the warrant issued by the magistrate, even though the magistrate has no jurisdiction over the particular complaint. Such liability only arises if the complainant undertakes to direct or aid in the service of a bad warrant, or interposes and influences the officer to execute such warrant. The officer, of course, is held to be protected if there is no defect or want of jurisdiction apparent on the face of the writ or warrant under which he acted. As to the liability of the judge who issued the warrants and before whom the plaintiff was tried and convicted, there seems to be more question. It is, says the court, a well-established rule that judges of courts of superior jurisdiction are not liable in civil actions for their judicial acts, even where such acts are in excess of their jurisdiction. Whether this immunity from civil liability is equally applicable to a judge of an inferior court or to a magistrate of limited jurisdiction, is a question about which the authorities are not in entire accord The court concludes that the tendency of recent decisions is towards the holding that where a judge of an inferior court or magistrate is invested by law with jurisdiction over the general-subject-matter of an alleged offense, that is, has the power to hear and determine cases of the general class to which the proceeding in question belongs, and decides, although erroneously, that he has jurisdiction over the particular offense of which complaint is made to him, or that the facts charged in the complaint constitute an offense and acts accordingly in entire good faith, such erroneous decision is a judicial one for which he is not liable in damages.—*The Green Bag.*

CARRIERS. (PASSENGERS) KY.

A decision of great interest to carriers, particularly railroads, is delivered by the Kentucky Court of Appeals, in Illinois Central Railroad Company vs. Allen, 89 Southwestern Reporter, 150. The duty of a carrier of passengers is held to be to attend to the comfort and safety of all its passengers alike, but not to furnish especial attention to any one in particular, unless under exceptional circumstances, such as sickness en route, though if a carrier voluntarily accepts a helpless passenger without an attendant, it thereby assumes the additional care commensurate with his needs. In view of this duty, it is held that where a blind man seventy-seven years of age frequently took short trips involving no change of cars, or, on taking a trip involving a change of cars, was assisted by chance acquaintances or the employees in charge of the train, the carrier was justified in refusing to sell him a ticket unless he secured an attendant. The case is not entirely without precedent; indeed, the court quotes to some extent from Illinois Central Railroad Company vs. Smith, 37 Southern 643, where the Supreme Court of Mississippi says that primarily the affliction of blindness unfits a person from safe traveling by railway, if unaccompanied, so that when a blind person applies to purchase a ticket, the ticket may be refused, unless the agent knows of his personal knowledge that the applicant for the ticket is competent to travel alone.—*The Green Bag.*

A clause in a deed, which, after granting a life estate, declared that it was the purpose of the grantor that, after the death of the life tenant, the lands should become and be the property of a certain institution, is held, in McGarrigle vs. Roman Catholic Orphan Asylum (Cal.) 1 L. R. A. (N. S.) 315, to convey no estate.

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INSOLVENCY. (RIGHT OF STATE TO PREFERENCE.) MD.—A case illustrating the departure in this country from the rule in England according to debts due the government, prerogative right to priority is State v. Williams, 61 Atlantic Reporter, 297. The court determines in that case that the state has no right to preference over other creditors of an insolvent corporation where it has a simple contract claim and no steps to enforce it are taken until after the appointment of a receiver for the corporation. It is pointed out that the decisions that the common law was adopted by the third article of the bill of rights of Maryland so far as it is not inconsistent with that instrument and the nature of our political institutions, settled the point that the state had a right at common law to have its debts first paid out of the property of its debtor remaining in his hands with no lien standing in the way It is said, however, that the right does not exist here with all the incidents to the royal prerogative right in England. We do not here have the writ of protection nor of the extent in chief or in aid. The priority of the state is a rule only in the distribution of the property of a debtor requiring the debt due to the state to be first paid where the individual creditor has no antecedent lien overreaching it. Even in England it is said where the right is enforced by the process in writ of extent in chief or in aid, it is necessary, in order to make it available, that the proceeding be resorted to before other vested rights to the property sought, to be subjected to the claim are acquired. So it is declared that where property has passed from the hands of the debtor, and into the custody of an officer of the court, the state is entitled to no priority.—*The Green Bag.*

Hiring at his own request, without notice of the father's objection, a minor who has been hired out by the father to work for another, is held, in Kenney vs. Baltimore & O. R. Co. (Md.) 1 L. R. A. (N. S.) 205, not to support an action for enticement

The irrigation of private lands is held, in Nash vs. Clark (Utah) 1 L. R. A. (N. S.) 208 to be a public purpose, for which land may be taken by condemnation.

The naming, as grantee of a partnership the member of which had died, but the name of which had been perpetuated, and the property kept together by consent of all parties interested, is held, in Walker vs. Miller (N. C.) 1 L. R. A. (N. S.) 157, not to render a deed void.

Notice of the failure of a machine to work is held, in First Nat. Bank vs. Dutcher (Iowa) 1 L. R. A. (N. S.) 142, to be waived by the continued efforts of the seller's agent to make the machine work, after the expiration of the time limited for the notice.

A statute requiring all bonds given for the faithful performance of official or fiduciary duties or the faithful keeping, applying, or accounting for funds or property, to be executed by a surety company is held, in State *ex rel.* McKell vs. Robins (Ohio) 69 L. R. A. 427, to be unconstitutional.

The right of a witness to claim the constitutional privilege against self-incrimination is denied in State vs. Jack (Kan.) 1 L. R. A. (N. S.) 167, where by the terms of a statute, the immunity afforded is coextensive with the constitutional privilege of silence.

Evidence that a boy injured by another's negligence was obedient and economical is held, in Cameron Mill & E. Co. vs. Anderson (Tex.) 1 L. R. A. N. S. 198, to be admissable upon the question of damages.

A nonresident alien is held in Re Breen (Mich.) 1 L. R. A. (N. S.) 349, not to be an incompetent executor, under a statute which provides that, if any executor shall reside out of the state, the court may remove him.

A grant to the "heirs" of a living person is construed, in Roberson vs Wampler (Va.) 1 L. R. A. (N. S.) 318, as meaning his children.

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PITTSBURGH, PA., JULY 25, 1906.

Court of Common Pleas No. 3,

ALLEGHENY COUNTY.

WILSON vs. PITTSBURGH & LAKE ERIE RAILROAD COMPANY.

Negligence—Dangerous position—Contributory negligence.

Plaintiff was injured while riding on the pilot of an engine, the injury being caused by a defect in a switch, the repairing of which was the duty of another road. Riding on the pilot was an extra dangerous position, and plaintiff's duties did not require him to be there but on the cars. Held, that he was guilty of contributory negligence.

No. 18 May Term, 1904. Trespass.

Opinion by EVANS, J. Filed August 4, 1905.

OPINION.

This is a motion to take off nonsuit. The plaintiff was a brakeman employed by the Pennsylvania Railroad, operating the P. V. & C. R. R., and at the time of the accident was employed as a yard brakeman and ran from Ormsby to Howard, in the yards of the Pennsylvania Railroad on the south side of the Monongahela river. In the course of his employment, on the 26th of October, 1903, his engine, in crossing the tracks of the defendant railroad campany, came into collision with a rail which struck the pilot of the Pennsylvania railroad engine and threw the plaintiff off and injured him. Alleging that the accident was occasioned by the negligence of the Pittsburgh & Lake Erie Railroad Company, he brings this suit. The evidence of the plaintiff showed that the crossing in question was, under an agreement between the Pennsylvania Railroad Company and the Pittsburgh & Lake Erie Railroad Company, to be maintained and kept in repair by the Pittsburgh & Lake Erie Railroad Company, at the joint expense of that company and the Pennsylvania Railroad Company. There was a third rail running parallel with the rails of the Pennsylvania Railroad on the crossing in question, and the evidence showed that the tracks of the Pittsburgh & Lake Erie Railroad had been raised a few inches just prior to the crossing by the engine on which the plaintiff was working, and, in raising the tracks of the Pittsburgh & Lake Erie Railroad, they had raised this third rail, which was between the rails of the Pennsylvania Railroad, and had not ballasted up the rails of the Pennsylvania Railroad at the crossing, so that when the engine of the Pennsylvania Railroad crossed over the tracks of the Lake Erie Railroad the rails of the former road sank, and the third rail between the rails of the Pennsylvania Railroad remaining stationary, it came into collision with the pilot of the engine of the Pennsylvania Company. There was no question but that the evidence shown was sufficient to take the action upon the part of the Pittsburgh & Lake Erie Railroad Company to the jury, but the evidence also showed that the plaintiff was riding at the time of the accident on the pilot of the engine of the Pennsylvania Railroad, and the motion for a nonsuit was made for the reason that the riding upon the pilot of the engine by the plaintiff was such negligence contributory to the accident as would bar his right of recovery. There can be no question that the pilot of an engine is an extra hazardous place, and unless the employee's duty requires him to ride in that extra hazardous place, the putting himself in that position would be negligence in case an accident resulted in which he was injured. The question whether or not the plaintiff was guilty of contributory negligence here depends entirely upon whether his duty called him to ride on the pilot of that engine. Brakemen ordinarily ride on the cars, but the plaintiff's statement here was that it was his duty to throw the switches, and that, having thrown a switch just prior to coming to this crossing, he jumped on the pilot of the engine in

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order that he might more conveniently throw the next switch. The evidence of the yard master, a witness called by the plaintiff, was that the plaintiff, in his duty as brakeman, was not required to ride upon the pilot; that, on the contrary, it was a rule of the Pennsylvania Railroad that brakemen should not ride upon the pilot of the engine, and that this rule was in force at the time of this accident. We have, then, this situation: The plaintiff was riding in a very dangerous position on his train. His riding there was not only not required by the duties of his position, but was against the rules of the company for whom be was working. His injury resulted from his being in that position. Had he been in the position where, the yard master said, his duties under the rules of his employer required him to be, namely, upon the cars, he would not have been injured in this accident. We think it is clear that his conduct was negligence and contributed to the accident, and that he can not recover in this case. It is not his breaking the rule of the company that employed him which makes him guilty of contributory negligence, bnt the position which he occupied being an extra hazardous one, his occupying that position makes him guilty of negligence, unless his duties to his employer required him to be there. As his duties to his employer did not require him to be there, but required him to be in a safer place, his being there was negligence.

For plaintiff, *James H. Smith* and *M. C. Acheson.*

For defendant, *Reed, Smith, Shaw & Beal.*

(Common Pleas No. 3, Allegheny Co.)

In re Grading, Paving and Curbing of Lang Avenue, From South End of Bridge Crossing Pennsylvania Railroad to a Point 185 Feet South Therefrom.

Municipal improvements—Changes from plans—Engineer's discretion.

Where a property owner petitions for the improvement of a street, and the work is done, the city engineer making some slight changes from the plans to suit existing conditions, the property owner has no standing to object to this assessment on account of the changes unless the changes damaged his property.

No. 438 August Term, 1905. Exceptions to report of Board of Viewers.

Opinion by KENNEDY, P. J. Filed July 11, 1906.

OPINION.

The improvement of this street was made upon the petition of George Westinghouse, Jr., alone, who owned the property on both sides of the improvement. He is now the exceptant to the report of the board of viewers. The improvement extends from the south end of the bridge or approach thereto, crossing the Pennsylvania railroad to a point 185 feet south therefrom. It was admitted on the argument of this case that, at the time this improvement was made, the bridge crossing the Pennsylvania Railroad and the approaches thereto were completed; and, in making the improvement as petitioned therefor by the exceptant, it was necessary to raise the grade slightly from that established by ordinance of the city, in order to meet the grade of the approach to the bridge. This was done by order of the city engineer and without any ordinance therefor by the city.

It is nunecessary to cite authorities showing that the city engineer is allowed a certain amount of discretion in the improvement of streets, to meet the situation and circumstances existing at the time the improvement is made; and in this case inasmuch as the situation was well known to the exceptant, who asked for the improvement, and it was absolutely necessary to make some change in the grade in order to meet the grade of the approach to the bridge, we do not think he can now complain. He does not complain that he has sustained any damages by reason of the change of grade His only objection is that the improvement was not made in accordance with the grade established by the ordinance. But this being rendered absolutely necessary in order to meet the situation at the time, we do not think that the engineer exceeded the discretion allowed him in such cases.

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The exceptions must be dismissed.

For city, *Thomas D. Carnahan.*
For exceptions, *Dalzell, Scott & Gordon.*

(Common Pleas No. 3, Allegheny Co.)

WEEDON vs. WEEDON.

New trial—Charge of court—Inaccuracy—Entire charge clear.

A new trial will not be granted where the court is inaccurate in an expression of the time within which the offence of adultery was committed, if from the whole charge the jury could not be mistaken that the time was limited to that set forth in the bill of particulars.

No. 34 February Term, 1904. In divorce. Motion for a new trial.

Opinion by KENNEDY, P. J. Filed June 15, 1906.

OPINION.

The only error complained of on the argument of this motion as having been committed by the court, which seems to demand consideration, was that suggested in Nos. 11, 12 and 13, of additional reasons filed, and was to the effect that the court did not in the charge to the jury confine their consideration of the charge of adultery alleged to have been committed by the defendant, to the time or times mentioned and alleged in the bill of particulars filed, but that after referring to the offence as alleged to have been committed on or about the 15th of June, 1906, the court stated to the jury that if they found the defendant guilty of adultery at that time "or at any other time" they should find a verdict for the plaintiff. Upon the examination of the charge, it will be observed that the court, after alluding to a time mentioned as the date on which the adultery was alleged to been committed, added, the words "or at any other time." This occured more than once in the charge, but it will also be observed that in using these words, in at least one instance (see page four of the charge) the court confined the times to those mentioned in the bill of particulars. That bill charged "improper intimacy" between respondent and co-respondent during the years 1901, 1902 and 1903, and the committing of adultery "during all the period of said improper intimacy . . . as opportunity offered." The court stated to the jury that "the question of fact is for your determination, and you are to be satisfied from the testimony of the plaintiff, the burden being upon her to so satisfy you, that this act was committed either at this time or at some other time during the alleged intimacy of the parties." This, we think, sufficiently and specifically limited the jury in their consideration of the question of the committing of adultery by the defendant, to the time or times mentioned in the bill of particulars, the court using almost the exact language of the bill in that connection.

A new trial must be refused, and it is so ordered.

For libellant, *S. G. Nolin.*
For respondent, *George H. Calvert* and *W. A. Blakely.*

Court of Common Pleas,

WASHINGTON CUONTY.

RONEY vs. WESTLAKE.

Judgment—Non obstante veredicto—Res adjudicata.

Plaintiff brought suit upon note under seal, which note was not stamped as was required under the act of congress at the time note was dated. Upon trial of case note was offered in evidence, but offer refused because note was not stamped as required by law. Plaintiff rested and court gave binding instructions to the jury for the defendant. Note was afterwards stamped and penalty paid therefor as provided by act of congress and new suit brought. Jury found for plaintiff for full amount of claim. On motion for judgment *non obstante veredicto.* Held, the plaintiff's claim in this suit was *res adjudicata.*

No. 204 February Term, 1906.

Motion by defendant for judgment *non obstante veredicto.*

Opinion by MCILVAINE, P. J.

OPINION.

John L. Roney on the 15th day of April, 1905, to No. 177 May term, 1905, of this

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court, brought suit in *assumpsit* against the defendant. and in his statement of claim filed alleged that his claim "was founded on a promissory note made by the said Jane R. Herron, in her lifetime, a copy of which is hereto attached;" and the copy of the note attached was as follows:

"August 18, 1899.

"$3,000.00

"One day after date I promise to pay to the order of John L. Roney, three thousand dollars, without defalcation for value received.

[Seal] JANE R. HERRON."

"Witness:

[Seal] JOHN ANDERSON."

On May 31, 1905, the defendant appeared and pleaded *non assumpsit*. The case was placed on the issue and trial dockets and on December 12, 1905, was reached for trial, when a jury was duly impanneled and sworn to try the issue joined between the parties. On the same day the jury after hearing all the testimony that the plaintiff had to offer and the charge of the court, rendered a verdict in favor of the defendant, and after a motion by the plaintiff for a new trial had been heard and overruled, judgment was on January 29, 1906, entered in favor of the defendant, and against the plaintiff on this verdict.

On February 8, 1906, John L. Roney, the same person named as plaintiff in the first suit, brought another suit in *assumpsit* against John S. Westlake, executor of Jane R. Herron, the same person named as defendant in the first suit, and in his statement of claim alleges that the suit is brought to recover the sum of three thousand dollars, with interest from August 19, 1899, upon a cause of action whereof the following is a statement:

On August 18, 1899, the said Jane R. Herron, now deceased, for a good and valuable consideration, executed and delivered to the said John L. Roney, the plaintiff above named, her certain promissory note under seal, for the sum of three thousand ($3,000.00) dollars, dated August 18, 1899, and payable one day after date. The said note in in the following form, to wit:

"August 18, 1899.

"$3,000.00

"One day after date I promise to pay to the order of John L. Roney, three thousand dollars, without defalcation for value received.

[Seal] JANE R. HERRON."

"Witness:

[Seal] JOHN ANDERSON."

"At the time of the signing of the said note by the said Jane R. Herron, and the delivery thereof by her to the said John L. Roney, no revenue stamps were put upon said note as then required by law. And after the death of the said Jane R. Herron, D. B. Hiner, collector of customs for the western district of Pennsylvania, on the 8th day of January, 1906, at the request of the said John L. Roney, affixed to the said note revenue stamps to the amount of sixty cents, the amount required by law, and canceled the same, and at the same time the said John L. Roney, through his counsel, paid to the said D. B. Hiner, collector of customs, the said sum of sixty cents for said revenue stamps, and also a penalty of ten dollars as provided by law where the note was not stamped at the time of its execution. All of which appears by the endorsement upon the back of said note in the following form, to wit:

"Internal revenue stamps to the amount of 60 cents, affixed to this instrument and cancelled by me at the request of John L. Roney, this 8th day of January, 1906, Penalty $10.00 collected.

(Signed) "D. B. HINER,
Collector."

The plaintiff therefore avers that there is due and owing to him from the estate of the said Jane R. Herron, deceased, the said sum of three thousand ($3,000.00) dollars, together with interest from August 19, 1899, which said sum neither the said Jane R. Herron nor the said John S. Westlake, executor, has ever paid, and which said sum the said John S. Westlake has neglected and refused to pay, and still neglects and refuses to pay, although often requested so to do, and to recover which this suit is brought."

To this the statement defendant pleaded *non assumpsit*, payment, set off, statute of limitation and "that all matters set forth in the

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plaintiff's statement have been adjudicated as will appear by the record at No. 177 May Term, 1905, of this court." The case was placed on the issue and trial lists, and in due course was reached for trial on June 8, 1906, when a jury was sworn and the case tried—the jury finding a verdict in favor of the plaintiff for the full amount of his claim.

At the trial the defendant undertook to convince the jury that the note sued on was a forgery, but he also introduced in evidence the record of this court to No. 177 May Term, 1905, in support of the plea *res adjudicata*. At the close of the case on the testimony, the court was requested to charge the jury that they should find for the defendant; first, because an inspection of the record of the case to No. 177 May Term, 1905, and the record of the case on trial shows that the plaintiff's claim in this case has been fully adjudicated; second, because an inspection of the note sued upon shows that it is not a note under seal and a recovery thereon in this suit is barred by the statute of limitations. The court refused these points *pro forma* and reserved the questions of law raised thereby, and the defendant now moved for judgment upon *non obstante veredicto* on these questions of law reserved.

At the first trial the plaintiff called John Anderson, the attesting witness on the note, who testified as to the execution of the note sued upon and as to the genuineness of the maker's signature. He also called Mrs. Jennie Anderson who testified to certain facts to corroborate her husband, John Anderson. He also called W. G. Roney, who identified several test papers and testified that he believed the signature of Jane R. Herron to the note in suit was genuine.

What transpired at the trial after this is best told by quoting from the record of the first case which was introduced in evidence in support of the plea of *res adjudicata:*

"By Mr. Dickson: (one of the plaintiff's attorneys) If the court please, we offer in evidence the note in suit 'Exhibit A' and ask to read it to the jury.

"By Mr. Meloy: (one of the defendant's attorneys) We object to the note being offered in evidence.

"By the court: On what ground?

"By Mr. Meloy: On the ground that it is incompetent.

"By the court: How do you mean incompetent?

"By Mr. Meloy: If the court please, the date of this note is August 18, 1899. On the first day of July, 1898, there went into effect the War Revenue Act which required a revenue stamp on all notes such as this, and the 7th section of that act is as follows: 'That if any person or persons shall make, sign or issue, or cause to be made, signed or issued, any instrument, document, or paper of any kind or description whatsoever, without the same being duly stamped for denoting the tax hereby imposed thereon, or without having thereupon an adhesive stamp to denote said tax, such person or persons shall be deemed guilty of a misdemeanor, and upon conviction thereof shall pay a fine of not more than one hundred dollars, at the discretion of the court, and such instrument, document, or paper, as aforesaid, shall not be competent evidence in any court.'

"By the court: We sustain the objection and overrule the offer.

"By Mr. Irwin: The plaintiff rests, as we have nothing else. I suppose the defendant is entitled to a compulsory nonsuit. I was but lately brought into this case and have not examined the question just ruled on by the court.

"By Mr. Meloy: If the court please, we ask for binding instructions to the jury in favor of the defendant, we do not want a compulsory nonsuit.

"By the court: Well, you are entitled to that, of course; but then the other side can take their own nonsuit any time before verdict, under the late act of assembly, and can afterwards make a motion to have it lifted; it is the same thing; the defendant is not bound to ask for a nonsuit, Mr. Irwin; they are entitled to ask for binding instructions.

"By Mr. Irwin: We can raise the same question on a motion for a new trial.

"By the court: Yes, sir; there is no doubt about that, it is simply a matter of procedure here."

CHARGE OF THE COURT.

"*Gedtlemen of the Jury:* This is an action brought on a note to recover the amount of

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that note, $3,000. A note is produced here and its signature is proven, and then the next step in a trial of this kind is to introduce the note in evidence and have it read to the jury, so that the jury will know what the obligation of the party is who made the note. When the plaintiff offered this note the execution of which they claim was sufficiently proven, the other side objected and said it was not competent to be offered in evidence for the reason that it was not made in compliance with the requirements of the act of congress that was in force at that time, being the War Revenue Act that was passed to raise revenue at the time of the Spanish-American war; one section of that act provided that notes of this kind should have a revenue stamp upon them, and if they were not stamped, they should not be admissable or offered in evidence in any case in any court of justice; and as this note was made while the act was in force, admittedly, we had to sustain the objection and the note could not be read in evidence, and that left the plaintiff without any sufficient evidence on which to ask a recovery, because without the note being read we do not know anything about what the deceased promised to pay, whether it was one cent or three thousand dollars, and the plaintiff having no additional testimony and the defendant having asked us in a point to direct you to find a verdict for the defendant, there being nothing for you to pass upon, we have to comply with that request and direct you to return a verdict in favor of the defendant. Bill sealed for plaintiff at request of his counsel who except to the charge before verdict of jury is taken.

"J. A. McIlvaine, P. J. [Seal]"

Taking the question of law reserved in the reverse order in which we have stated them, our first inquiry is this: "Is the note in suit (granting that Jane R. Herron placed her signature to it) a note under seal?" Or is it a simple promissory note, dated August 18, 1899, not under seal, and the suit brought thereon February 8, 1906, therefore barred by the statute of limitations?

The word "seal" enclosed in a circular scroll on the same line with the signature and immediately before it, in our opinion is presumptively the seal of the maker of the note in the absence of any testimony to the contrary. That is, if the note was presented to Mrs. Herron written in full as it is including the word "seal" and she wrote her name immediately after the word "seal," and on the same line, and then handed the note to the payee (as testified by the witness Anderson) the presumption would be that she had adopted the word "seal" enclosed in a scroll as her seal and the note would be a note under seal.

"It is enough if there was a sealing and delivery, of this the jury are the iudge and upon proof of the handwriting of the obligor they may presume the sealing and delivery; *Long* v. *Ramsey Executor*, 1 S. & R. 72. It has been herefore decided that any mark made by the pen, in imitation of a seal, may be considered as a seal. The usual mode is to make a circular, oval or square mark opposite to the name of the signer, but shape is not material. Something there must be intended for a seal and the writing must be delivered as a deed;" *Taylor* v. *Glasser*, 2 St. R. 502.

The fact that the word "seal" and the scroll enclosing it were immediately before the maker's signature in place of immediately after—the usual place for it—is not conclusive against the plaintiff's contention that the note was a sealed instrument. The location of the seal on the face of the note is immaterial if the maker intended it as her seal, and this was a question for the jury; *Larah* v. *Nissley*, 156 Pa. St. 329. The defendant's contention on this question was dual in character; first, that the form of the note showed by inspection that it was not a sealed instrument—this was a question of law for the court and was the question of law we reserved; second, that the maker never signed, sealed and delivered it to the plaintiff—this was a question of fact and was referred by the court to the jury for its determination. And the jury having found that Jane R. Herron signed her name to the note immediately after the word "seal," enclosed in a circular scroll, and on the same line therewith, and then delivered the paper as her note to the plaintiff, we cannot as a question of law say that the note is not a sealed instrument notwithstanding this finding of the jury, on the contrary

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the facts found by the jury being admitted, we are of the opinion as a question of law that the note is a sealed instrument and the suit brought thereon on February 8, 1906, was not barred by the statute of limitations.

This brings us to the other question: "Was the plaintiff's claim in this suit *res adjudicata?*"

The general rule may be stated as follows: The judgment of a court of concurrent jurisdiction directly upon the point is, as a plea, a bar, or as evidence conclusive between the same parties upon the matters directly in question in another court," or, stated in another way, "a verdict and judgment to operate as an estoppel must have been for the same cause of action; the same fact must have been at issue, and the test by which the identity is to be established is when the same evidence will support both actions;" *Duchess of Kingston's case*, 2 *Smith's Leading Cases*, 663 (6th Am. Ed.); 1 *Greenleaf on Evidence*, 526, last edition.

"In general the binding effect of a former adjudication depends upon the identity of the rights involved not on the evidence or on the argument presented," *Kay* v. *Gray*, 30 Pa. 455.

The question is not so much what was litigated by the former suit as what might have been litigated.

"It is no avail that the plaintiff in the present proceeding produced some new and additional evidence. The issue was the same, and it is the issue, not the evidence which is concluded by the former adjudication," *Rauwolf* v. *Glass*, 184 Pa. St. 237.

In *Rockwell* v. *Langly*, 19 Pa. St. 502, the court say that "there is no rule of legal practice of higer value than that which arrests the strife of litigation by declaring that one suit and judgment therein is an end of controversy as to all matters put in issue, and which ought to have been put in issue."

The test is, could the issue in the two cases be sustained by the same evidence? *Schwan* v. *Kelley*, 173 Pa. St. 72; *Raising* v. *Graff*, 17 Pa. 509.

Let us now look a little more closely at the facts in the case at bar:

The issue in both cases was, "Did Jane R. Herron, on August 18, 1899, sign, seal and deliver to the plaintiff the note in question and did her estate owe to the plaintiff $3,000, the amount named in said note, with interest from August 19, 1899?"

The first step in the plaintiff's proof in each of these actions was to call the attending witness to prove the execution and delivery of the note, and the next step was to introduce the note in evidence to show the amount that the maker promised to pay the plaintiff. This last fact could not be proven by the oral testimony of the attesting witness, because the note was the best evidence of the promise it contained. The execution and delivery of the note was proven and then the note was offered in evidence at the first trial. The admission in evidence of the note was objected to because the U. S. revenue stamps which were required by the act of congress to be placed on promissory notes were not placed on it at the time it was executed nor since. The objection was sustained, and the plaintiff having no further testimony the case was then submitted to the jury upon the defendant's request for binding instructions to find for the defendant, and a verdict was rendered accordingly. At the second trial the execution and delivery of the note were proven and then the note was offered in evidence, it having been stamped at some time between the time of the first and second trials. At the first trial the court sustained the objection to the admission of the note in evidence on the authority of *Robinson Turnpike Company* v. *McNamara*, 72 Pa. 272. On the second trial no objection was made to its admission in evidence.

If the note which was offered in evidence at the first trial had had the U. S. revenue stamps on it by the internal revenue collector on the 11th of December, 1905, (the day before the first trial) in place of on the 8th of January, 1906, the note would no doubt have been admitted in evidence at the first trial, the same as it was at the second trial. The only difference in the two trials is therefore wholly attributed to the delay of the plaintiff in having the note stamped and in not having his evidence in shape when the first case was called for trial. This being true, is he entitled to a second trial of the same issue while the judgment against him in the first case stands unreserved, unless

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on its face it is null and void? And this brings us to the point on which, in our opinion, this case turns. There are many cases, some of which were cited at the argument by counsel for the plaintiff, which hold that a case which is decided adversely to the plaintiff on the ground of the want of jurisdiction has not been tried on its merits; *Weigler* v. *Coffman*, 144 Pa. St. 489. The plaintiff in such cases had no opportunity to be heard on the merits, which necessarily comes after the question of jurisdiction is determined.

The case at bar therefore, in our opinion, turns on the question whether the first suit of the plaintiff was properly brought and the issue properly joined between the plaintiff and defendant when the jury was sworn, and whether the court had jurisdiction to submit that issue to the determination of the jury, and whether the plaintiff failed for lack of evidence which he could by due diligence have produced; or was the case taken from the jury, not for lack of evidence but because of want of jurisdiction in that the plaintiff had no right of action when the suit was brought, In other words, if the defendant had demurred to the plaintiff's statement on the grounds that the note on its face was not actionable on account of the absence of the U. S. revenue stamps, would the demurrer have been sustained? As between the parties did the absence of the U. S. revenue stamps in any way affect its validity? We think not. The act of congress in order to insure the payment of its revenue prescribed penalties against the parties to such instruments for not stamping them, and one of these penalties was that an unstamped note should not be competent evidence in any court. But the act no where provides that suit shall not be brought by the holder thereof upon an unstamped note. He could bring this suit on an overdue and unstamped note and have it stamped as provided by the act at any time before the time came when he might be required to offer the note in evidence. And in the case at bar, if the plaintiff had done just before the time of the first trial what he did just before he brought his second suit, he would have had no trouble. We conclude therefore that the first suit was properly brought, the issue therein properly joined and that there is nothing on the face of the record to show that the judgment entered on the verdict of the jury after motion for a new trial had been overruled is irregular or reversible, much less null and void, because entered without jurisdiction. In our opinion, the plaintiff is just in the situation of an unsuccessful party who asks for a new or second trial on account of after discovered or after acquired evidence which could have by due diligence been produced at the first trial. He is trying to avoid a judgment against him in the same issue by setting up his own *laches*. He had from August 19, 1899, up to December 12, 1905, the day of the first trial to have the note stamped as he finally did have it stamped. He took the risk of the defendant objecting to the competency of the note when it would be offered in evidence at the trial. Because he took that risk, his legal adversary has obtained judgment against him, the matter in dispute between them has been litigated and so long as that judgment remains unreversed his claim must be taken as "*res adjudicata.*"

We might further suggest that if we should hold that the note was not actionable when the first suit was brought because it had not been stamped, then the question might arise whether the gift of a note, the collection of which could not be enforced at law when due because the donor had failed to do something that the law required her to do to give this right of action, is a valid gift. Under the evidence there can be no doubt that the note sued upon was a gift of the maker thereof to the payee—a gift *inter vivos*. If it be admitted that the note was not a security, the payment of which could be enforced by suit when it became due, did Jane R. Herron give the plaintiff $3,000 when she handed him the note? In other words, the plaintiff, as it appears to us, is confronted by a dilemma which has two horns and that by escaping one he impales himself on the other. If the judgment in the first suit is a valid judgment, it is a bar to the second suit; if the judgment in the first suit is a nullity because the suit was brought on an unstamped note, then the plaintiff had no right of action against Jane R. Herron in her lifetime, and he cannot now sue her executor to collect $3,000

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which she attempted to secure to him as a gift, but which she failed to do in an effective way.

And now, July 9, 1906, judgment in favor of the defendant and against the plaintiff for costs is entered *non obstante veredicto* upon the ground that the plaintiff's claim was adjudicated to No. 177 May Term, 1905, and the judgment entered in that case is conclusive in this issue and the court should have so charged the jury as requested by the defendant's counsel at the time of the trial.

BY THE COURT.

Eo die exceptions noted at request of plaintiff's counsel, and bill sealed.

J. A. McILVAINE, P. J. [SEAL]

For plaintiff, *R. U. Irwin, J. M. Dickson.*

For defendants. *R. H. Melvy, C. L. V. Acheson.*

[From Harry Russell Myers, Esq., Washington, Pa.]

Imprisonment of Corporations.

In view of recent decisions one may consider the legal proposition fairly well settled that a corporation can commit a crime. However much the strict logician may invey against the argument that a thing without soul, hands, or mouth may be guilty of criminal intent and criminal action the fact is before us that this contention has prevailed in the highest court of the land. To take advantage of false logic and authoritative mistake is one of the high functions of the opportunist. Therefore the suggestion should not come amiss that this illogical construction, placed on the corporate status, should be carried to its illogically logical conclusion whereby it may become a weapon in the hands of those whom it was designed to undo. To relieve the really guilty lawbreakers, the corporate officers, the trend of late rulings has been to place all the blame on the inanimate, betrayed corporation. The reason is plain: the corporation can pay, as a fine, a small per cent of its unlawful spoils, whereas the individual malefactor, if convicted, must needs suffer the degradation of wearing stripes. Let us say, in deference to the reputations of our judiciary, that capital commands the keenest gray matter and the keenest gray matter produces the argument which gives birth to the law.

This letter is not a brief on behalf of any client. It is not written for the convincement of any court. It is intended merely as a suggestion as to how justice may be bred from injustice. No authorities will be cited or decisions construed. The layman may assume that the conclusions herein contained are based on good law. The lawyer will know that in the present state of corporate law all things are possible and that the theory here advanced is as near in accord with the trend of judicial reasoning as any other theory which may be evolved.

The first postulate is: A corporation may commit a crime.

The second postulate is: A corporation may be punished for a criminal offense.

The third postulate is: A corporation may be punished by a fine.

A fourth common error (certainly not a logical conclusion from the three preceding postulates) is: A corporation cannot be imprisoned.

The prisons of the United States should voice the unanimous interrogatory: "Why?".

A man with a shaven head, wearing clothes that are a brand of shame, could argue thus: "I took $1,000 that did not belong to me. The state has taken away my liberty, my earning power, and my material ambitions for a period of five years. This corporation took $500,000 a year that did not belong to it. Its officers have been held guiltless They are free on the streets to day. The corporation has been adjudged guilty. What right has that guilty corporation to its liberty, its earning power, and its material ambitions, while I am confined and denied all three?"

The snug man of finance would say: "What are you going to do about it?"

The convict would answer: "If I were on the bench ruling on cases as the law is to day, without a single statutory change, I would instruct a jury to bring in a verdict against the guilty corporation exactly as if that corporation were what it claims to be—a person."

The questioner would continue: "How would you execute the sentence?"

The convict would answer: "I would commit the corporation to jail. If the corporation does not consist of the men who

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own and manage it—there is only one other consistency which it can have. It is not a thing of air or it could not commit a crime. It must be a material something. It must be composed of its capital stock and all its assets, tangible and intangible. The state has deprived me, a human being, who committed a crime, of liberty, earning power, and material ambitions. It could not touch my soul. So it confined my erring flesh, inanimate without my soul, yet containing the soul.

"To do justice to one and all, the state should confine the assets, inanimate but containing the miscalled soulless being's soul. For the period of punishment not a dollar of the corporate cash should be circulated; not a bond should bear interest, not a share of stock pay a dividend, not a single franchise should be operative, not a wheel of machinery should be turned."

The snug man roused to a financial sentiment would expostulate: "Think of the infinite harm you would do, think of the thousands out of employment, think of the money lying idle."

The convict would reply: "I am out of employment, my family is deprived of my support—because I committed a crime. If I had employed ten thousand men and been convicted of crime I should have been sent to jail just the same. You say, 'think of the money lying idle.' I say, 'think of the thousands of men idle (to all intent of the community) in prisons to day. Are their misapplied lives a greater loss to the public than the loss of misapplied dollars? Can the government to day prevent a corporation from spending $50,000,000 in Europe or Asia if it chooses? Is not that money lost to our people?"

The snug man might answer rather stupidly: "What do you think would be the result of such a theory of yours being put into practice?"

The convict would answer: "I am not omniscient but I can foretell one certain result. The directors and managers of corporations would be forced to obey the laws we have to day, which are amply sufficient to prevent wrongdoing. Nowadays wrong is done, why? Because the dividends must be produced. If they are not, new officers will be chosen. The director is forced to disobey the law. Why? Because his competitor does, because *his* competitor does, and so on around the circle.

"Suppose one corporation should be imprisoned for five years. Then what a wail would go up from the 'widow-and-orphan' stockholders for their imprisoned money! There would come a demand for conservative, lawful management of corporations from every stockholder in the country and the day of reckless defiance of law and order would be past.

"Let me add," the convict would conclude, "that all public franchises would be forfeited on imprisonment of the corporation. Of course even at present a public official loses his office when imprisoned for crime. I think under my little theory that the public service corporation would be the most carefully and beneficently administered of all."

This is a brief letter on a subject of breadth inestimable. To forestall the hasty critic it should be stated in conclusion that not all the arguments for or against the convict's proposition have been discussed herein.—DONALD R. RICHBERG, in *The Green Bag.*

A decree denying the right of a corporation to have bonds secured by mortgage on its property surrendered by a pledgee who was seeking to foreclose its lien on the bonds against the pledgeor, on the ground that the bonds had been wrongfully put upon the market, and had never been rightfully negotiated is held, in Ruckman v. Union Railway (Or.) 69 L. R. A. 480, to be no bar to a subsequent suit against the corporation to foreclose the mortgage by which they are secured, since the latter question could not have been determined in the former action.

An agent authorized to issue policies is held, in Richard v. Springfield F.& M. Ins. Co. (La.) 69 L. R. A. 278, to bind the company by all waivers, representations or other acts within the scope or requirements of his business, unless the insured has notice of the limitation of his power.

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PITTSBURGH, PA., AUGUST 1, 1906.

Court of Common Pleas No. 3,

ALLEGHENY COUNTY.

STEVENS vs. STEVENS.

Divorce—Cruel and barbarous treatment—Sufficiency of evidence—One assault.

In an action for divorce on the ground of cruel and barbarous treatment the evidence showed one assault with some vague evidence as to a second assault, but the libellant was not compellant to leave the home of respondent. Held, that libellant had not made out her case.

No. 310 November Term, 1905. In divorce.

Opinion by EVANS, J. Filed March 10, 1906.

OPINION.

The libellant seeks a divorce on the ground of cruel and barbarous treatment, endangering the life of the libellant, and indignities to the person, making life burdensome. The master appointed to report the testimony and his opinion thereon, has filed a report recommending that the divorce be refused, to which exceptions have been filed by libellant.

The libellant appears to have abandoned her contention that the respondent had offered such indignities to the person of the libellant as to render her condition intolerable and life burdensome and thereby force her to withdraw from his house, and finally bases her claim for a divorce upon the ground of cruel and barbarous treatment, endangering her life. The master reports that the evidence and testimony show but one act of cruel and barbarous treatment, whereas it is contended by counsel for the libellant that there were two separate and distinct acts of cruel and barbarous treatment, each of which endangered the life of the libellant. It is possible that the evidence of the libellant would justify the finding that there were two occasions on which the respondent had struck her and knocked her down, and yet we think the master was justified in finding that there was only one. The testimony of the libellant upon that subject is as follows:

"Q. Wish you would state the last time he struck you what the occasion of that was.

"A. Well, he came in, he had been drinking, and looked around and saw the boy. He had just came in and swore he would kill him. Of course, I couldn't stand up and see that. I tried to get in between them. He struck the boy and then he struck me, so I was black and blue. He knocked me down, calling me vile names, and that evening he came in it was the same thing over."

Now, if she means in saying that "it was the same thing over," that he knocked her down again, that would make two acts of cruelty, or two times that he had struck her; but she being the party in interest and the libellant, the master was justified in finding that there was only one assault, in view of the loose language used by the libellant in describing it.

It will be observed that the question asked by her counsel would infer that there had been times before this when the respondent had struck the libellant. That is an illustration of the manner in which the examination of witnesses was conducted in this case. Counsel lead the witnesses, cross-examined them, tried to get them to testify to things which they alleged they knew nothing about.

The testimony of the witness which the libellant calls "the boy" in the paragraph quoted above from her testimony, gives the following version of that attack, referring to the quarrel described by the libellant:

"Q. Whose fault was it?

A. It was my fault.

Q. Was it her fault?

A. No, sir; it was mine. He and I was having trouble when it happened. Well, she was not to blame for it.

Q. You were the cause of it, weren't you?

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A. Yes, I was the cause of it.

Q. Now, did you hear any remark that he made that he was sorry he didn't do certain things when he knocked her down?

A. I don't know, no, sir; I didn't hear anything that I remember.

Q. Did you see him strike her?

A. I did. He was trying to hit me and she went to interfere and he grabbed her on the arm, and I guess he punched her and threw her down on the floor."

Within a week after this occured, the respondent left the libellant and has been separated from her ever since. She did not leave his house, and does not in any of her testimony pretend that it was necessary for her to leave his house in order to protect herself. It was claimed by counsel for the libellant on the argument of the case that the libellant owned the house in which they lived and that was the reason why she did not leave. That is not borne out by the evidence. The house was rented, but it is not clear whether it was rented to the libellant or to the respondent; and as regards the supporting of the house the libellant testifies as follows:

"Q. Since you have been married, who has kept the house?

"A. Well, I guess we both kept it. I worked all the time and all my money went toward the house, and of course, he helped some too."

That is the evidence as to the management of the house, except the mere fact that the house was rented.

The master was right in recommending that the divorce be refused, because there is no such cruel and barbarous treatment shown in this case as would justify a divorce; and, further, there is no pretense that the libellant was compelled to leave the home of the respondent, or that there was ever any occasion for her leaving.

Divorce is refused.

For libellant, *Fred. S. Kobe.*

The right to file a bill of review after the lapse of the statutory period for an appeal, is denied in Watkinson v. Watkinson (N. J. Err. & App.) 69 L. R. A. 397, except in case of new or newly discovered matter.

(Common Pleas No. 3, Allegheny Co.)

SCHOYER vs. KAY.

Wills—Devise of rents—Power of disposal by will—Title of devise.

Testator devised to A the rents and profits of certain real estate for life, without power of sale, but with the right to devise same by will. Held, that A did not take title in fee simple.

No. 754 February Term, 1906. Case stated.

Opinion by KENNEDY, P. J. Filed July 11, 1906.

OPINION.

The contention of the plaintiff is that, under the devise recited in the case stated, she took an estate in fee simple in the property in question, claiming that the prohibition in said devise against selling, and incumbering the property, is not a limitation of estate, but a parental restraint of alienation for the purpose of protecting and safe guarding the devisee; and, there being no devisee over the plaintiff took an estate in fee.

We cannot adopt this view. The words of the devise are significant: "To my daughter-in-law, Mrs. Lucy Morrison, "I devise and bequeath" (not the property, but) "the rents, issues and profits of my warehouse and lot situated on Wood street, in the city of Pittsburgh; and now in the possession of J. R. Weldin & Company, for and during the term of her natural life. It is my will that she shall not have the power to sell or incumber the said property, but that she shall have the power to devise the same by last will and testament. The devise is in lieu and stead of the annuity which I am now paying to my said daughter-in-law, and which, on her electing to accept this provision of my will, shall cease and determine. If the warehouse should be destroyed by fire, insurance to be expended in the reconstruction of building, insurance premiums to be paid from time to time by my executors. On settling their final account, the executors may invest enough money in the name of the Safe Deposit & Trust Company to keep the premiums paid."

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It is plain that at common law the devisee would take only a life estate. The rule, however, was changed by the act of 1833, which provides that "All devises of real estate shall pass the whole estate of the testator in the premises devised . . . . . unless it appears, by a devise over or by words of limitation or otherwise in the will, that the testator intended to devise a less estate." The terms of the devise show plainly the intention of the testator to limit the estate conveyed to a life estate. There is a restraint of alienation of the property, and there are words also constituting a limitation of estate.

In the authorities cited by plaintiff, there are no words of limitation or words showing that the testator intended to devise less than a fee.

In *Musselman's Estate*, 39 Pa. 459; the testator authorized the devisee, as to the property devised, to "do and leave to whom she pleases." The supreme court, in an opinion by Chief Justice Lowrie, says: "This expression is open to grammatical criticism, but no amount of it can remove the prompt and spontaneous interpretation that he intends her to have this much as her own property, to be disposed of as she pleases. In *Forsythe* v. *Forsythe*, 108 Pa. 129: the testator devised to his wife, Mary, all his property, real and personal "during her natural life, with power to dispose of the same as she may think best." And so it is in all the cases cited, the beneficiaries were given authority to sell or dispose of the property devised for life. The failure of a devise over might enlarge the gift if there were not other words to indicate a limitation of the power of disposition to devising; but the prohibition to sell or incumber plainly indicates that the beneficiary could not dispose of the property by sale during her lifetime, and we do not think it can be properly contended that the testator did not mean that the beneficiary's disposition of the property was only intended to become effective after her death.

The devise is in the nature of a spendthrift trust, and the power of disposition is expressly limited to that by will. The withholding of all power to sell or incumber plainly indicates the intention of the testator to limit the estate of the beneficiary to a life estate.

"All mere technical rules of construction must give way to the plainly expressed intention of a testator, if that intention be lawful," *Beck's Appeal*, 78 Pa. 432.

See, also: *Fisher* v. *Herbell*, 7 W. & S. 63; *Bender* v. *Dietrich*, Id. 284; *Hinkle's Appeal*, 116 Pa, 490; *Cooper* v. *Pogue*, 92 Pa. 254; *Long* v. *Paul*, 127 Pa. 456; *Kennedy* v. *Kennedy*, 159 Pa. 327.

The court being of opinion that under the will of William Morrison, deceased, the plaintiff, Lucy O'Hara Schoyer, did not take a title in fee simple to the property described in the case stated, and that she could not convey a good and sufficient title thereunder by deed of conveyance tendered, as set forth in said bill, to the said Frederick G. Kay, defendant, judgment is ordered to be entered and is hereby entered for the defendant.

For plaintiff, *Schoyer & Hunter.*

For defendant, *J. W. Shields.*

Court of Common Pleas No. 2,

ALLEGHENY COUNTY.

VERONA SCHOOL DISTRICT vs. McKAY.

Taxes—Filing lien—Renewal within five years—Act of May 4, 1889.

Under the act of May 4, 1889, and the amendment of June 4, 1897, relating to filing tax liens and requiring their revival within five years, a tax lien entered on May 8, 1889, for taxes accruing before the passage of the act and not revived within five years has lost its lien and a *sci. fa.* to revive thereafter cannot be sustained.

No. 282 January Term, 1905. *Scire facias* to revive tax lien. Rule for judgment.

Opinion by FRAZER, P. J. Filed March 20, 1905.

On May 8, 1889, plaintiff entered in the prothonotary's office a lien against the property of defendant for school tax assessed for the year 1888. No proceedings were had on that lien, or effort made to collect the amount thereof until November 3, 1904,

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when this *sci. fa.* was issued. To which defendant sets up defense: (1) Failure to renew lien within five years, and (2) payment. The act of May 4, 1889, P. L. 79, is relied upon by defendant to sustain his first defense. That act is entitled, "An act limiting the duration of the lien of county, city, borough, township and school taxes and municipal improvement claims" The first section provides: "That hereafter no county, city, borough, township or school tax, levied or assessed, shall remain a lien on real estate for a longer period than two years from the time of such levy or assessment, unless the same be entered of record in the prothonotary's office of the proper county in which such real estate is situate; and *no* lien so entered therefor, or for any municipal improvement claim, shall remain a lien thereon for a longer period than five years from the date of such entry, unless the same be revived and continued by writ of *scire facias* within said period, and duly prosecuted to judgment as in case of judgment liens."

The second section repeals all inconsistent laws.

Plaintiff's contention is that the act of 1889 does not apply to taxes levied and assessed previous to its approval. Whether the act required taxes assessed for the year 1888 to be filed in the office of the prothonotary within two years from the time of their assessment, we think is immaterial, so far as this case is concerned. The act of 1889 and the amendment to its provisions of June 4, 1897, P. L. 122, together, it seems to us, require all liens for county, city, borough, township and school taxes to be revived within five years from their entry, in order to be preserved and continued; The act of 1889 applies to liens entered after May 4, 1889, and the act of 1897 applies to those entered previous to that date. The tax in controversy was filed in the office of the prothonotary after the approval of the act of 1889, and therefore, under the provisions of that act, would not remain a lien upon the property against which it was assessed "for a longer period than five years from the date of such entry," unless revived and prosecuted to judgment within that time. The lien not having been revived within that period, expired May 8, 1894. As this *sci. fa.* cannot be sustained, the rule for judgment must be discharged.

Rule discharged.

For plaintiff, *Thomas & Meals.*

For defendant, *James S. Campbell.*

Court of Common Pleas,

FRANKLIN COUNTY.

Cumberland Valley and Waynesboro Railroad Company et al., vs. The Chamb-ersburg and Gettysburg Electric Railway Company.

Railroads—Street Railways—Crossings.

A railroad company which does not own the fee in its right of way cannot prevent a street railway company from building an overhead crossing twenty-two feet high, at a point where the street railway company has acquired from the land owners the right to construct its railway.

Motion to continue preliminary injunction.

Opinion by WEISS, P. J. Filed September 14, 1903.

STATEMENT.

The Cumberland Valley and Waynesboro Railroad Company, now leased to and operated by the Cumberland Valley Railroad Company, crosses the Chambersburg Turnpike road at a place called West Fayettville, from both sides of which, east and west, the turnpike road ascends hills of considerable length and grade.

On the south side and extending to the middle of the turnpike road, the plaintiffs own in fee a strip of land upon part of which their station buildings are erected.

Along the same side of the road and over the part of the lot of ground abutting upon the turnpike, the defendant is projecting an electric railway, permission for building which was duly obtained from the authorities of the townships of Guilford and Greene through which the line traverses, and from the turnpike company; but declined and refused by the Cumberland Valley and

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Waynesboro Railroad Company, owners of the stated lot of ground, and the Cumberland Valley Railroad Company, as stated lessee.

The plaintiffs in their bill complain that the defendant intends to build and is engaged in building its railway upon the turnpike road at the place where their railroad crosses the road and upon and over the lot abutting upon the turnpike—either at grade or by an elevated structure, the purpose to do which was disclaimed by the defendant at the hearing of the motion to continue the preliminary injunction therefore granted, unless it was not authorized to cross the railroad at some other point hereafter designated, in which event it desired to show its right to erect an overhead structure at the crossing mentioned.

It is, however, the intent and plan of the defendant to deflect the course of its railway at a point on the south side of the turnpike road and a short distance from the top of the hill rising to the west of the station named, over private lands, and construct the same in an irregular curved line to the top of the opposite hill or nearby, and there connect with its main and continuing line on the turnpike, in such manner that the railway will cross the tracks of the railroad straight across at a height of twenty-two feet above them and at a distance of about five hundred feet from the station. Its right of way lies across private lands in open country where there is no public road, street or highway, and the plaintiffs protest in their bill that the construction of the railway by the defendant at a place and manner indicated would interfere with the free use and safe operation of their railroad and property, and cause damage and injury to passengers and employes; and prays that the defendant be perpetually enjoined from crossing their tracks wherever a public road or other causeway does not cross their railroad. There is no road leading on either side of the plaintiff's railroad to or along the place of proposed crossing or across the same. There is a warehouse a short distance south of the railroad which is reached from the turnpike road by an open way, and immediately beyond are two small buildings used as a car house and coal house.

A siding or switch is laid from and a little north of the warehouse along the east side of the railroad track which is single, and extends beyond the place of intended crossing.

It was stated during the argument of the motion that the plaintiff's right of way is sixty feet in width, and the fact is so found.

A stream courses from the north across the turnpike road and a short distance west of the plaintiff's railroad, and flows past and beyond the place where the defendant desires to cross. To carry a span sixty feet or more long across the plaintiffs' right of way upon supports erected on both sides, east and west, and away from the lines, is an ordinary undertaking and may readily be done.

Whether the defendant has the right to cross the plaintiffs' track overhead at a point where there is not a public road crossing the same and build its railway over lands not owned by it or either of the plaintiffs and in and to which neither plaintiff has an interest save that the right of way of the Cumberland Valley and Waynesboro Railroad Company extends across such private lands, is for determination.

CONCLUSIONS OF LAW.

The case was ably argued and the plaintiffs' contention was that though they were not the owners in fee of the land situate at the place where the defendant intends to cross overhead, they had an interest in their right of way which would preclude the defendant from exercising its franchise without their permission and against their protest. They cite as authority to sustain their position the case *Northern Central Railway Company* v. *Electric Railway and Traction Companies*, 177 Pa. 193. The case decides that "the plaintiff has a substantial property interest in its right of way which the defendant is bound to respect. While that interest cannot be called a fee, it is a species of title that has some of the incidents of an estate in lands." . . . . "It would seem to be rather a fee in the surface and so much beneath as may be necessary for support, though a base or conditional fee, terminable on the cessor of the use for railroad purposes. But whatever it may be called, it is in substance an interest in the land special and exclusive in its nature and which may be the subject of special injury, 'by the obstruction of access to the abutting street,' and therefore within the

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rule which governs the application of equitable relief."

The day following the argument of this case, *Railroad Company* v. *Street Railway Company*, 176, Pa. 559; was argued and the justice deciding it quotes approvingly from *Rahn Township* v. *Railway Company*, 167 Pa. 90; that passenger railways under the act of 1889 "may diverge for a short distance where the conformation of the surface or the positions of streams make it necessary in order to avoid discomfort or danger to the traveling public," and adds "to avoid grade crossings, or for any other reason amounting to necessity, or what is the same thing in such matters, great public convenience. The occasion for such divergence and its extent are question of location, and the decision of them primarily is within the discretion of the railway company." One of the purposes sought in *Railroad Company* v. *Glenwood Railway Company*, 184 Pa. 227: was "to prevent the defendant from constucting a bridge or viaduct over the tracks and property of the plaintiffs at a point where there is no street or highway," and the cases just referred to again receive judicial recognition.

The legislature, too, in Sec. 7 of the act approved June 7, 1901, (P. L. 523), ordains that "any railway company incorporated under this act, shall have the right and power, if it deem it to be necessary, in order to make connection with any portion of its track, whether main line, branches or extensions to acquire property whether by purchase or otherwise; and after acquiring such property, shall have the right to lay its track upon the same as if it were a public highway, and to connect the tracks, so laid upon the property so acquired, with any other portions of its track laid upon public highways adjacent thereto."

The claim of the plaintiffs is as varied and as picturesque as the landscape surrounding the place where relief is sought.

The defendant, they say, cannot cross their tracks at grade because they are land owners abutting on the turnpike road at the intended crossing, and have not consented to a crossing by the company.

It cannot cross the plaintiffs' tracks by means of a bridge, where they are laid over the turnpike road, without their permission, and because so doing would be dangerous and interfere with the safe operation of their railroad along and across this highway.

It cannot diverge from the turnpike road and by way of lands acquired, cross their railroad tracks overhead at any point about five hundred feet south of their station, because there is no "public road, highway, street or other crossing" at that point, by reason of which it is inhibited by law from such crossing. They further protest that the act of 1901 confers no such right, and in the absence of provision for compensation the defendant cannot cross their right of way, which is a property interest.

What the plaintiffs say the street railway company can do in this case pursuant to the act of 1901, may be illustrated by an example:

A railroad crosses diagonally two public streets, crossing each other at right angles. A street passenger railway having the right to lay its tracks upon both streets may do so across private lands away farther from the intersection of the two streets than the line of the railroad, and connect the track on one street with that on the other and thereby avoid crossing the railroad tracks at grade or otherwise.

The supreme court in *Railroad Company* v. *Paper Mills*, 149 Pa. 20; distinguishes easement from this "newly-invented interest in land," by declaring that the name of the easement is "perhaps appropriate enough to the railroad's ordinary right of way for tracks;" and Northern Central Railway Company, *supra*, decides that the plaintiffs acquired in the right of way and the narrow strip which it held by deed "a fee in the surface and so much beneath as may be necessary for support" which it may use for railroad purposes "as absolutely and as unconditionally as an owner in fee." In the former case, land was needed for depot or station, etc., in a large city and condemned. In this case the plaintiff's road is located through open fields along the places in question, and is not surrounded with buildings, or needs of more than ordinary traffic facilities.

We understand the court above to decide that a railroad has absolute dominion for railroad uses, over the whole surface of its

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right of way; that it has the right to build foundations and superstructures; to move its cars upon the tracks unmolested; to space upon and above the cars for the safe carriage of its employes; and the right to subsoil necessary for supporting its plant. We do not understand that a railroad company acquires title to a right of way from pit to dome as an owner in fee does to lands, but that it has such an interest over and on the surface and above and below it for railroad uses, so long as the railroad is operated. The superior right of the plaintiff lies within that belt. As we understand the rulings, the defendant could do prior to the act of 1901 all that the plaintiffs say it can do since, and it must be assumed that the legislature intended to accord to street railway companies, privileges and rights not theretofore existing.

It was not necessary to provide that they may acquire property and lay their tracks and connect them with other portions of their tracks on the main line or branches, for the reason that they were invested with the right by the courts to deflect their routes across private lands with the owner's consent to avoid discomfort or danger, etc., to the traveling public "where the conformation of the surface or the positions of streams make it necessary," and by the detour intended in this case safety will be promoted as compared with a crossing at the turnpike road.

The act provides that they may lay their tracks upon the acquired property "as if it were a public highway."

The property rights of the plaintiffs do not extend upwards beyond a line necessary to transport its passengers and employes with safety and dispatch, nor downward below a line of support for their tracks and superstructures. The line of demarcation has not been, and probably cannot be, defined in feet.

The defendant company must acquire land whereon to lay its tracks, and acquisition means consent in some way by the land owners. Thereupon it can pass as though it had laid them along a highway.

It is true it alone can travel over the land, but the right given is as though the general public also could.

The act is meaningless, in view of what was theretofore decided, if this is not its interpretation.

The defendant intends to cross at a height of twenty-two feet above the surface, and beyond this no special property vests in the plaintiffs for railroad purposes by reason of their right of way. It has nothing to give, and nothing could be acquired by the defendant. Danger to the plaintiffs' road will not be increased any more than if a public road were laid at the place where the defendant seeks to cross, and the right given the defendant to lay its tracks as if it were a public highway necessarily implies that it has the right to use them when laid as if upon a public highway.

Whether viewed in the broad sense of property rights, or in the sense of an easement in the ordinary acceptation of that word, the plaintiffs have the right of uninterrupted transit over their right of way. They have the further right of immunity from increase of danger. Above and below this sphere, and beyond security against increased danger, they enjoy rights in common only with other persons.

Inasmuch as twenty-two feet above the surface at this point is deemed sufficient to assure the necessary property rights to the plaintiffs, and inasmuch as the defendant has the right of transit over acquired land as if it were a public highway—which it may exercise anywhere along its proposed detour—the danger to transportation by the plaintiffs is reduced to that degree which exists, and would exist if it were at a public crossing.

The rights enjoyed by, and the duties imposed upon, a street passenger railway company on or across a public highway are enjoyed by, and imposed upon, it, on or across lands acquired for railway purposes under the act of 1901, except that it may not be required to obtain municipal consent to pass over lands so acquired; and it is probable that at this place and height, the company may cross the plaintiffs' railroad without, and independent of, the seventh section of the act.

We are of the opinion that the plaintiffs' motion to continue the injunction heretofore granted ought not be allowed and the same

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is accordingly refused and the injunction dissolved.

For complainant, *D. Watson Rowe* and *Sharp & Elder.*

For contra, *Edward J. Ford* and *Charles Walter.*

Court of Common Pleas,

WASHINGTON COUNTY.

BOYD et al. vs. PENNSYLVANIA, MONONGAHELA & SOUTHERN RAILROAD COMPANY.

Report of viewers—Motion to quash—Exceptions to report—Amendment.

Viewers in their report failed to state the quality and value of land taken as is required by act of assembly and on motion to quash proceedings at costs of plaintiff. Held, report can be referred back to same board of viewers with directions to file a report "stating the quality and value of the land taken" upon their first giving notice to both plaintiff and defendant at least twenty days notice of the time and place of meeting.

No. 140 February Term, 1906. Exceptions to report of viewers assessing damages to plaintiffs for right of way appropriated through plaintiffs' land.

Opinion by TAYLOR, J. Filed Jnly 5, 1906.

OPINION.

There are no exceptions filed to the proceedings in this case up until the filing on March 26, 1906, of the report of the jury of view awarding the plaintiffs damages.

On April 12, 1906, the defendant filed the following exceptions to said report of viewers:

1. The said report does not state the quality of the land taken, as required by law, and

2. The said report does not state the value of the land taken, as required by law, and exceptants ask that said report be quashed by the court at costs of the plaintiffs.

An examination of the viewer's report shows these exceptions to be well taken, but admitting the report of viewers deficient in these two particulars, in the requirements of the act of assembly and under the decisions, does it necessarily follow before the case is at issue the report must be quashed, when in all other particulars in compliance with the act of assembly? We think not. For omissions in reports of viewers in road cases it is our practice to refer back the reports of viewers to them for correction when there is no misconduct alleged against viewers and they have simply omitted from their report certain requirements to make it a full compliance with their duties under the law. It is not enough to prevent this on the part of the court and order a new jury to view on the one contention that the first jury of view would doubtless report the same amount of damages. If the viewers had in mind when they made their report that which is made the subject of these two exceptions, they can amend their report; if not, they can again view the premises with notice of the day of their meeting on the land for said purpose to both sides who can be present and be heard, if they desire to do so, by counsel or witnesses, on the quality and value of the land taken, as required by law. We can see no injustice in this course to either side; if we could, we would send the questions to a new jury of view.

And now, July 5th, the exceptions filed to the report of viewers in this case came on to be heard and were argued by counsel, whereupon, upon due consideration, the exceptions are sustained and the report of viewers is hereby referred back to the same viewers for amendment in the particulars excepted to, and they are ordered to file a report "stating the quality and value of the land taken," as required by law, first giving the parties, plaintiffs and defendants, at least twenty days notice of the time and place of meeting so that they may be heard on the question of the quality and value of the land taken.

BY THE COURT.

For plaintiff, *L. R. Boyd.*

For defendant, *James A. Wiley.*

[From Harry Russell Myers, Esq., Washington, Pa.]

A homestead entry of land, recognized by the Land Office, is held, in Reservation of State Bank v. Holst (S. D.) 70 L. R. A. 799, to entitle the entry man to possession.

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Control of Advertisements.

The *Law Times* in a leading article on this subject, after stating the regulations in the different countries of Europe says: "It is in America, perhaps, that advertising has assumed its most aggressive form; but it is clear from the extracts given from the regulations in force in many American cities that the feeling against the unbridled use of advertisement is growing. The regulations passed in Chicago in 1900 are peculiarly stringent. No sign-boards exceeding 12 feet square may be placed within 400 feet of any public park or boulevard. This is an interesting provision, as it seems to cover much the same ground as one contained in the Advertisements Regulation Bill, which desired to prevent the amenities of a public park, promenade, or residential district being injuriously affected by the exhibition of advertisements. This latter case of a residential district is covered in a rather striking way by another of the Chicago regulations, which forbids any sign or bill boards to be erected in any street where three-quarters of the buildings in the street are devoted to residential purposes only, unless the consent be previously obtained of three-quarters of the residents and property owners on both sides of the street. Evidently the inhabitants of Chicago are getting weary of having the various ills to which flesh is heir and their appropriate remedies eternally brought to their notice, for one of these regulations forbids the placing or posting in any public place of any handbill or advertisement giving notice of any person having, or professing to have, skill in the treatment or curing of any disorder or disease, or giving notice of the sale or exposure for sale of any nostrum or medicine. A somewhat similar provision is in force in New Orleans. Another notable provision requires billboards above a certain size to be formed of sheet or galvanized iron or some quality of incombustible material. It is however regretable to find that these Chicago regulations, exeellent though they be in many ways, are as yet more or less of a dead letter, for no effort appears—at least, up to 1905—to have been made to put them in force. A form of advertising, which is evidently common in the states, is the distribution of handbills or 'dodgers,' to use the apparently technical Americanism. It is specifically forbidden in Chicago, New Orleans, Boston and Pittsburgh. The Advertisements Regulation Bile (England) also dealt with this point, though, as the case of Hills v. Davies, 88 L. T. Rep. 464, shows, it is already possible, at least in the metropolitan area, to forbid the practice.

The taxation of advertisements is mainly of French origin; but is now in force also in Italy, Belgium, and in some of the Swiss cantons, though by no means in all. In America it appears to be in force in some of the states and cities, though in many cases it is difficult to distinguish it from the license required for bill posting, a license very generally required in American regulations. The regulations of the city of New Orleans would appear to supply the solitary instance of the taxation of advertisements in newspapers. The French, Italian and Belgian regulations specifically except newspaper advertisements. Indeed, the whole question of the regulation of newspaper advertisements is almost absolutely ignored by parliamentary return, though the subjects on which the return was required to supply information are wide enough in their range to include all classes of advertisements. Probably the regulations dealing with newspaper advertisements are but few, and unimportant in character.—*American Law Review*,

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A judgment of a justice of the pace, rendered within less than the time prescribed by the statute after service of summons, is held, in Kerr v. Murphy (S. D.) 69 L. R. A. 499, not to be so far void that its execution can be enjoined.

A railroad company which constructs a siding or switch from its road to a manufactory at the expense and over the land of the latter, solely for its benefit, and under a written agreement silent as to the length of time it is to remain, is held, in Rodefer v. Pittsburgh, Ohio Valley & Cincinnati R. Co. (Ohio) 70 L. R. A. 844, to have no right to maintain the siding against the objection of the owner of the manufactory.

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Justice Without Delay

The title of a paper read before the Pennsylvania Barr Association by Ira Jewell Williams, Esq., of Philadelphia, and published in the report of that association for 1905, in which he makes some valuable suggestions in regard to the arrangement of the trial lists and the distribution of the cases among the courts in large cities. He also speaks of the burden of jury service and the avoidance of it by the most intelligent part of the community, saying: "Much comment has been made upon the tendency of the so-called "better classes to avoid jury service. Imagine the state of mind of a busy manufacturer or merchant, who is compelled to attend court as a juror for a period of three weeks, and may be called for service on only two or three juries in that time, and actually permitted to serve on perhaps only one; or who is subpoenaed as a witness and obliged to go to court perhaps half a dozen times before his testimony is given. Our intelligent juror or witness when he is confronted with the appaling waste of his own and others' time, or an unsuccessful litigant who is thus obliged to pay bills of costs in excess of the amount involved, or a mechanic's lien claimant who is non-suited merely because of the impossibility of obtaining final judgment within five years, is forced to conclude that, "some one has blundered." His conclusion is warranted by the facts. No business could be successfully conducted as we carry on the business of our courts. Every manufacturer is on the constant lookout for new devices to save time; if he lags behind he will be overtaken and passed by shrewder competitors. Are our courts, is our Bar, equally on the *qui vive* to adopt plans of procedure which will minimize the vexations of the law?

"A froward retention of custom," says my Lord Bacon, "is as turbulent a thing as an innovation; and those who reverence too much old times are but a scorn to the new." The practice handed down from our ancestors must necessarily be, in some respects, antiquated and outworn, having been devised to meet less complex social and business conditions. What will do for Pike county, with perhaps a score of cases each year, is deadly inertia for Allegheny and Philadelphia, and as much out of place as small retail methods in the conduct of a million-dollar wholesale business. Courts of law are sacred places, but there is no place to sacred for the admission of enlightened common sense."—*American Law Review.*

That a party pleading a judgment as an estoppel must sustain the plea by showing that the particular matter in coutroversy was actually determined in the former litigation, in accordance with his contention, is declared, in Draper v. Medlock (Ga.) 69 L. R. A. 483, where it appears from the record introduced in support of the plea that several issues were involved in such litigation, and the verdict and judgment do not clearly show that this particular issue was then decided.

An invitation to use a railroad right of way as a footpath, is held, in Williamson v. Southern R. Co. (Va.) 70 L. R. A. 1007, not to arise from merely permitting such use, where a sign is conspicuously posted warning persons not to do so.

Injury to property near a railroad by the jarring of the earth, by the casting thereon ol soot and cinders, and the emission of smoke, physically injuring it, is held, in Smith v. St. Paul, M. & M. R. Co. (Wash.) 70 L. R. A. 1018, to be within the protection of a constitutional provision requiring compensation for property damaged for public use.

Negligence, or error of judgment, of a competent foreman having authority to hire and discharge the men, in refusing to permit the selection, from a store of rope, of a piece sufficient for the use intended, and insisting upon the use of a piece which proves to be insufficient, is held, in Vogel v. American Bridge Co. (N. Y.) 70 L. R. A. 725, not to render the master liable for a resulting injury to a workman, since the risk of injury from such fault is assumed by the men as accidental to the execution of the work in its details.

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PITTSBURGH, PA., AUGUST 8, 1906.

Orphans' Court,

ALLEGHENY COUNTY.

In re Estate of JANE M. FRANCIS, Deceased.

Wills—Charitable gift.

A testatrix left the residue of her estate, "to be applied to procuring a place of resort for young girls, engaged in stores and other places, to spend their evenings pleasantly and profitably, as the ladies who will have charge shall think best," if A, B and C (three ladies) will undertake to establish such a place. On the audit and distribution of the testatrix's estate, the three ladies named in the will expressed their unwillingness to accept the trust provided in the will and asked the court to appoint a charitable organization, of which they were the trustees, instead. Held, that as the purpose of the nominated organization pppeared to be germane to the object contemplated by the testatrix, the residue of the fund should be awarded to said organization.

No. 93 October Term, 1905.

Opinion by MILLER, J. Filed July 14, 1906.

STATEMENT.

The question is, whether testatrix's charitable gifts can be awarded to the Business Womens Club by nomination of her appointees, or whether it goes to her next of kin?

The will is dated October 9, 1891; after designating a large number of specific legacies she provides as follows: "If there is a residue left after disposing of the amounts I have willed, I desire that it be applied to procuring a place of resort for young girls engaged in stores and other places, to spend their evenings pleasantly and profitably, as the ladies who will have charge shall think best; if Miss Mary L. Jackson and Miss Ella Sawyer of Allegheny and Mrs. Henry Phipps of Allegheny, will undertake to establish such a place, or will appoint others to do so."

Under date of September 20, 1892, she made a codicil to her will, changing some specific bequests, upon the margin of which codicil appears the following: "In case there is more than necessary to give the full amounts I have willed to my relatives and the individual portions I have willed, then the extra amount shall be given to the object I have mentioned in my will in regard to the improvement of the girls employed in stores and other places in Pittsburgh or Allegheny city, as the ladies who shall take it in charge shall think best;" and on the 19th day of May, 1893, she made a second codicil relating solely to specific bequests formerly made, the principal change being with respect to the provision for her invalid sister, closing her codicil as follows: "It is my desire that this codicil be annexed to and made part of my last will and testament, I hereby ratify and confirming said last will and testament in all respects, excepting so far as the same is changed by this codicil, and I hereby ratifying and confirming the codicil as part thereof." Both these codicils were duly witnessed by two attesting witnesses. She died on July 7, 1893.

At No. 81 November Term, 1894, being the first audit of her estate, the notes of testimony as taken by the trial judge show that the executor there stated that the ladies named to carry out the trust as to the residue believed the amount too small for the purpose intended, and that their other duties interfered; that there is a similar institution known as the "Helping Hand" in successful operation, which required no necessity for establishing a new one; the question of naming other persons in their stead for the purpose of carrying out this charity was not disposed of.

As the will required the preservation of the residue pending the life of testatrix's sister, the balance on hand at that number and term, to wit: $12,381.16 was ordered to remain in accountant's possession until further order of court. The sister of testatrix, Mrs. Smith, died on August 4, 1905; the residue of the estate is now ready for distribution and amounts to $12,608.16.

Miss Jackson, Miss Sawyer and Mrs. Phipps, are now unwilling to accept the trust provided in the will, and ask the appoint-

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ment of the "Business Womens Club of Allegheny," which organization desires to accept the appointment.

This organization was started in 1886, under the name of the "Helping Hand Society;" its early reports indicate that its purpose was to benefit working women and girls, give them a place for meetings and instruction in the English branches, sewing, dress making, choral, gymnasium exercises, entertainments and the benefits of the library. From its year book of 1904–1905, it appears that its object now is "To promote the welfare of women, particularly those dependent upon their own efforts for support, by cultivating a spirit of fellowship and co-operation on the basis of a high moral and religious standard without sectarian distinction." It charges its members nominal yearly dues and a small fee for certain instructions, by means of which, and voluntary donations, it has maintained permanent quarters; furnished lecture courses, entertainments, books and magazines, and giving instruction in millinery, plain sewing, cooking and other useful branches of industry, to a very large number of deserving women and girls, to whom it also furnishes meals or luncheons at certain periods of the day for very low prices; it has secured subscriptions towards a permanent endownment fund, and submits a draft of a proposed application for charter, which sets forth *inter alia*, that its present endownment fund as well as the fund in this estate, if awarded to it "shall be used only for the permanent endownment of the corporation, and the income thereof only applied for the purpose of maintenance;" its proposed board of trustees includes Miss Jackson, Miss Sawyer and Mrs. Phipps, the parties named in testatrix's will, as well as other women, known as active and responsible in charitable and philanthropic work.

OPINION.

The gift of the residue in trust for this charity was made under the original will dated October 9, 1891; the first codicil affirms it and the second, even if executed less than the statutory period before her death, which does not seem to be the fact, does not change or destroy in any way the charitable gift made under this will; *Morrow's Estate*, 204 Pa. 484; *Sloan's Appeal*, 168 Pa. 428; *Reamer's Estate*, 36 P. L. J. 135.

There is no force in the contention that these proceedings must be instituted by leave of the Attorney-General; for the reason that the trustees are named by the testatrix, with the power of appointment; this is not the case of a gift to charity without naming it, or naming trustees to carry it out.

The trustees named in the will did not decline to accept the trust in the first audit of the account. The executor there, even if he had been authorized to speak for them, did not do so; as it was there apparent that the residue could not be distributed at that time owing to the provision made for the invalid sister, no conclusion was announced touching the final disposition of this residue. There were no duties for these trustees to perform until after the death of the sister; they were not called upon to determine the matter until now, when under the power conferred upon them they have performed that duty by appointing and recommending the "Business Womens Club of Allegheny."

That this is an unincorporated association is immaterial; as such it may act as trustee under a will; *Pickering* v. *Shotwell*, 10 Pa. 23; *Smith* v. *Nelson*, 18 Vermont 511. Even if this were a valid objection it will be cured by the proposed incorporation to be affected before the fund is passed over.

The purpose of the Business Womens Club is germane to the objects contemplated by the testatrix; she desires the fund to be applied toward procuring a place of resort for young girls, in stores and other places to spend their evenings pleasantly and profitably; this is what has been done by the nominated organization and what it proposes to continue to do under its charter.

The trustees were authorized to establish such a place, or appoint others to do so; the fact that such a place has been established does not destroy the power of the trustees if they "shall think best" to appoint or establish an organization to carry out the purpose of the trust. It is doing the very thing she contemplated, to wit: procuring a place of resort for those she intended to benefit.

Testatrix left no instructions as to the details by which this trust should be carried into effect; she provided for neither name, place, amount, nor manner of operation as

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to separate or independent charity; she had only one purpose in view and that was to help young girls who worked in stores and other places; the rest she left to the discretion of her trustees or their appointees.

Her purpose was to better the condition of certain girls and women; these gifts are sustained as valid; *Bispham's Equity*, Sec. 119; *Croxall's Estate*, 162 Pa. 579; *Pepper's Estate*, 154 Pa. 331.

Other similar schemes have been successful and should be encouraged. This one should have a fair trial. The fund under the proposed charity will and must be preserved. Even if the new management should fail the charitable use will not be permitted to fail; *Daly's Estate*, 208 Pa. 66; whereas here the use being established "the next of kin can have no further concern in the matter."

The residue of the fund will be awarded to this organization to be paid to it upon filing a certificate that it has been incorporated in accordance with the form submitted, and that it will use the income of the fund for the purposes covered by its charter and as indicated in the testatrix's will.

For accountants, *Reed, Smith, Shaw & Beal.*

For Mary McElhinny et al., *Chantler & McClung.*

Court of Common Pleas No. 2,

ALLEGHENY COUNTY.

SPIVING vs. PRINTY et al., et ux.

Real estate—Description in agreement—Shortage in ground—Specific performance.

A, by writing, agreed to sell to B the property 210, 212, 214, 216 Sandusky street, Allegheny, lot 77 x 100 to an alley. The property consisted of four brick houses, but the lot was only 66 feet wide. A tendered B a deed for the entire lot, 66 feet, which was refused unless A would abate the price. Ten months later B filed a bill for specific performance. Bill dismissed.

Under the description in the agreement B was only entitled to the four houses and the ground actually there. The refusal of the deed was a cancelation of the contract, and B could not later, after the property had risen in value, elect to purchase the property.

No. 1292 April Term, 1906.

Opinion by FRAZER, P. J. Filed July 12, 1906.

The purpose of this bill was to compel the defendants to specifically perform a contract for the sale of real estate situate on Sandusky street in the city of Allegheny. From the bill, answer and proofs, we find the following facts:

FINDINGS OF FACT.

1. On the 24th day of April, 1905, defendants signed an agreement in writing to sell and convey "in fee simple, clear of all incumbrances, all that certain property situate Nos. 210, 212, 214, 216 Sandusky street, Allegheny, Pa., lot 77 x 100 to an alley," for the consideration of $35,000; payable $15,000 in cash and the balance in three years with six per cent interest. The property mentioned consists of four brick dwelling houses occupying the entire frontage of the property on Sandusky street, which is 66.18 feet and not 77 feet, as stated in the agreement.

2. The agreement referred to in the previous finding of fact was prepared in the office of W. L. Scott & Company, real estate agents, by C. L. Saxton, an employee of that firm. At the time of its execution by the defendants plaintiff was not present and was not mentioned as the purchaser, nor was his name inserted in the agreement as purchaser until some time after it had been signed by defendants. A copy of the agreement was not given defendants and they have not had in their possession a copy of it and had no information that plaintiff had signed the same as purchaser until afforded constructive notice by its being recorded, and no actual notice until the beginning of this proceeding.

3. At the time defendants signed the agreement referred to in the preceding findings, the extent of the frontage of the lots on Sandusky Street was discussed by defendants and Saxton and upon reference to maps belonging to Scott & Company, it was ascertained that the actual frontage of the property on Sandusky Street was 66.18 feet and not 77 feet as Saxton had set out in the agreement. Saxton thereupon stated to defendants that the error was not material and that the agreement need not be changed. Upon that assurance the paper was signed by defendants and the hand money of $1,000. paid.

4. On June 6th, 1905, defendant, David C. Hick, went to the place of business of plaintiff in the city of Allegheny and there tendered plaintiff a general warranty deed for the property fronting 66.18 feet on San-understanding, however, we are of opinion that the describing of the property as num-

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dusky street, duly executed by all the parties and demanded the balance of the cash payment provided for in the agreement of April 29, 1905. Plaintiff thereupon stated to Hick that he had no knowledge of the matter but would meet Hick at the office of W. L. Scott & Company the following morning. Upon plaintiff and Hick meeting at the office of Scott & Company, plaintiff declined to accept the premises and carry out the agreement unless defendants would allow a *pro rata* abatement in the purchase price based upon the actual frontage, which abatement defendants refused to make.

5. Between June 6, 1905, and March 30, 1906, the date of filing the bill in this case, the market value of real estate in the neighborhood in which defendant's property is located has greatly enhanced in value and the property now in controversy is at present worth not less than $50,000, and would sell for that amount.

6. The agreement of April 24th, 1905, after being signed by plaintiff was on June 8, 1905, recorded in the Recorder's Office of Allegheny County, and no effort made to enforce the same until the bill was filed in this case

7. The hand money payable to defendants under the agreement was paid by check of W. L. Scott & Company. The attorney who examined the title to the property was selected by Scott & Company, his report was made to them, and there is no evidence to show that the hand money paid by them was charged to plaintiff or that he ever repaid the same to them.

8. Plaintiff in his bill avers that the premises in dispute "have a peculiar value to your orator, and that no damages can adequately compensate him for defendant's breach of said contract." No testimony was offered in support of this allegation, and as the property is not unlike other property in that neighborhood and has no greater value or superiority by reason of its location over other property, we find this allegation not sustained.

CONCLUSIONS OF LAW.

1. The testimony clearly showed an understanding between the parties at the time of signing the agreement of April 24, 1905, that the Sandusky street frontage of the property was but 66.18 feet and not 77 feet as asserted in the paper prepared by the real estate agent's clerk. Aside from that bers 210, 212, 214 and 216, clearly shows the intention of the parties was the conveyance of those four houses together with the appurtenant ground. No other intent can reasonably be inferred, as the houses occupied the entire frontage owned by defendants. Had the frontage been greater than 77 feet, there can be no doubt but that the purchaser would be entitled to a deed for all the land occupied by the houses; *Shattuck* v. *Cunningham*, 166 Pa. 316; and we see no reason why the same principal should not apply in case of a deficiency, under the circumstances of this case. Under the conditions existing here, defendants were not obliged to make any abatement in the price to be paid for the property, and having endeavored to perform their part of the agreement by the tender of a deed for all they contracted to convey, they did all the law required of them, and on the refusal of the purchaser to make payment in accordance with the terms of the agreement, had a right to treat his refusal as a rescinding of the contract by him, which they seem to have done when he refused to receive the deed tendered him. After the tender of the deed by defendants to plaintiff, nothing was done by plaintiff towards enforcing the contract until almost ten months afterwards, when property in that neighborhood had greatly enhanced in value. This delay under the circumstances is unreasonable and would make a decree for specific performance at this time unjust and inequitable if there were nothing else in this case.

2. As it clearly appears the intention of the parties was that a conveyance should be made for the property known as numbers 210, 212, 214 and 216 Sandusky street, and defendants having tendered plaintiff a duly executed warranty deed therefor which was refused by him, he is now not entitled to a decree for specific performance, and his bill must be dismissed at his cost. If, however, there are any circumstances which entitle plaintiff to recover back all or any part of the hand money paid by him, that question can be determined in an action at law, and the decree to be made in this case will be without prejudice to the rights of either party in any action at law that may be instituted in reference to that payment.

Specific performance is refused and the bill dismissed. Let a decree be drawn accordingly.

For plaintiff, *C. E. Theobald.*
For defendants, *Robert T. McElroy.*

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PITTSBURGH, PA., AUGUST 15, 1906.

Court of Common Pleas No. 2,

ALLEGHENY COUNTY.

OGILVIE vs. FRASER.

Sale of real estate—Specific performance—Damages.

Plaintiff entered into an agreement with defendant to purchase a certain lot and paid on account $100 hand money. The agreement contained a stipulations of the kind of house to be erected. After signing of the agreement plaintiff started his contractor to excavate for an apartment house, to which defendant objected and stopped the contractor and then tendered him the $100 hand money paid, and upon his refusal to accept it sold the lot to another person who took possession. On bill in equity by plaintiff for specific performance and damages; held, that defendant having sold the lot there could be no decree for conveyance, but that plaintiff was entitled to a return of the $100 hand money and to be paid for necessary expenditures before he was informed of defendant's objection to the building.

No. 1178 January Term, 1906.

Opinion by FRAZER, P. J. Filed July 12, 1906.

The bill in this case was filed for the purpose of compelling the defendant to specifically perform an agreement for the sale of real estate. From the bill, answer and proofs, we find the following facts:

FINDINGS OF FACT.

1. Defendant being the owner of lot No. 88, in the Brighton Heights Plan, situate in the eleventh ward of the city of Allegheny, through George T. McDonald, an agent employed by him to sell lots, on September 11, 1905, sold lot No. 88 to plaintiff.

2. The agreement of sale was in writing signed by McDonald, a copy of which is marked Exhibit A attached to plaintiff's bill. Of the purchase money $100 was paid in cash to McDonald, who turned the money over to defendant, who accepted the same, thereby ratifying the sale.

3. Section five of the agreement of September 11, 1905, is as follows:

"That the second party hereby covenants and agrees that there shall not be erected on said lot or any part thereof any tavern, drinking saloon, slaughter house or other building of offensive purpose or occupation, nor shall any building erected thereon be used or occupied as aforesaid; that no dwelling house costing less than $2,500 shall be built on said premises and the same shall not be erected nearer to the avenue or street than twenty feet, said restriction to hold good for the next ten years."

A clause similar to this is inserted in all agreements or contracts made by defendant for the sale of lots in the plan above referred to and single dwelling houses are required to be erected upon each lot, subject to restrictions similar to those contained in the agreement with plaintiff.

4. On September 20th, a contractor employed by plaintiff to erect a three story apartment house with store room on the first floor, began excavating on the lot in question. The day following defendant learned from the contractor the style of house plaintiff proposed to erect and at once notified the contractor that the erection of a house of that description would not be permitted and advised him to cease work until plaintiff could be seen by defendant. Upon the contractor's refusal to stop work, defendant ordered his employees from the premises and immediately notified plaintiff that an apartment house with store room on the first floor was offensive to him, would injure the sale of other lots in the plan, and that if plaintiff persisted in his intention to erect a house of that class the agreement of September 11th would be rescinded. Upon plaintiff's refusal to change his plans, defendant rescinded the agreement and tendered back to plaintiff the $100 paid by him on account of the purchase money.

5. Since plaintiff's refusal to change the style of building proposed to be erected by him, defendant has conveyed the lot in

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dispute to another person who has paid the purchase price therefor and is now in possession of the premises.

6. Plaintiff's claim for damages consists of four items, as follows: $100 hand money paid at the time of the execution of the agreement of September 11, 1905; $115, the cost of plans for the building proposed to be erected upon the lot in question; $6, building permit; and, $80, for excavating.

7. The plans for the apartment house proposed to be erected by plaintiff were prepared for him some time previous to his purchase of the Brighton Heights lot from defendant, and were intended for a building which plaintiff proposed to erect upon a lot in another locality, and can be used hereafter by plaintiff without change or alteration. The contractor did but a comparatively small amount of excavating, has made no demand upon plaintiff for payment therefor and the evidence does not show how much work was done by him before he was notified to cease work by defendant.

CONCLUSIONS OF LAW.

Defendant having sold the lot in dispute to another person, thereby placing it beyond his power to make a conveyance to plaintiff, the only question in the case is that of damages sustained by plaintiff. That he is entitled to recover back the purchase money paid by him, and also the cost of the building permit, is clear. The other items of his claim, it seems to us, he is not entitled to recover. No claim has been made against plaintiff for the excavating, and even if there had been a demand made therefor, we doubt very much whether recovery could be had, as defendant notified the contractor before he had done any work that the erection of an apartment house on the lot was contrary to the agreement of sale and would not be permitted. The building plans were prepared some time before plaintiff purchased the lot in dispute, and were not an expense incurred on account of the purchase from defendant and chargeable to that account.

In accordance with the foregoing, plaintiff is entitled to recover $ 106, with interest from September 22, 1905.

Let a decree be drawn accordingly.

For plaintiff, *A. H. Mercer.*

For defendant, *W. B. Adair.*

(Common Pleas No. 2, Allegheny Co.)

HAMMOND et al. vs. DICKEY.

Equity—Quit claim deed—Clerical error—Relief.

Where a quit claim deed shows a clear intention to convey an interest, and a clerical error of the scrivener as to the name of the grantees is apparent, a court of equity upon bill filed for that purpose will correct the mistake.

No. 333 July Term, 1906.

Opinion by FRAZER, P. J. Filed May 25, 1906.

The purpose of this bill was to correct a clerical error in a quit claim deed made by defendant to plaintiffs. From the bill and answer we find the following facts:

FINDINGS OF FACT.

1. John B. Dickey died on the 5th day of October, 1898, intestate, seized in fee simple of lots Nos. 91 and 92 in Shady Avenue Plan of Lots in the third ward of the borough of North Braddock, which lots are fully described in plaintiff's bill.

2. John B. Dickey left to survive him as his only heirs at law, his wife, Laura V. Dickey, and the following named sons and daughters: Maude E. Dickey, intermarried with Harry G. Hammond; Grace G. Dickey, now Grace G. Betts; J. De Witt Dickey, and Easton Poe Dickey. Easton Poe Dickey died on the 23d day of October, 1902, intestate, unmarried and without issue.

3. On the 22d day of October, 1898, the defendant, J. De Witt Dickey, by quit claim deed recorded in the Recorder's office of Allegheny county, in Deed Book Vol. 1015, p. 35, quit claimed all his right, title, interest, claim and demand, whatsoever, of, in, and to the two lots of ground referred to in the first finding of fact to his sisters and brother, Maude E. Dickey, Easton Poe Dickey and Grace G. Dickey, their heirs and assigns forever.

4. In drawing the quit claim deed referred to in the preceding finding of fact, the scrivener erroneously designated the grantees as "Maude E. Easton Poe and Grace G. Dickey," instead of "Maude G. Dickey, Easton Poe

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Dickey and Grace E. Dickey," the error being the result of the omission of a comma after the letter "E." in the name of the first named grantee, Maude E. Dickey.

5. No such person as "Maude E. Easton Poe," is known to any of the persons to these proceedings and there was no intention on the part of defendant to include any person by that name as one of the grantees in the quit claim deed referred to.

CONCLUSIONS OF LAW.

The bill and answer clearly show the intention of defendant to quit claim his interest in the lots described above to his sisters and brother, and that their designation as "Maude E. Easton Poe and Grace G. Dickey" by the scrivener as grantees was erroneous. It therefore necessarily follows that the plaintiffs are entitled to the relief prayed for, and that the quit claim deed to them from defendant, dated October 22, 1898, and recorded in the Recorder's office of Allegheny county in Deed Book Vol. 1015, p. 35, should be so corrected that the names of the grantees therein shall be "Maude E. Dickey, Easton Poe Dickey and Grace G. Dickey."

Let a decree be drawn accordingly.

For plaintiff, *J. F. Mayhugh.*

For defendant, *V. L. Barber.*

(Common Pleas No. 2, Allegheny Co.)

DRUGMAND vs. PITTSBURGH COAL COMPANY.

Ancient water courses—Riparian owner—Obstructions—Equity.

Proceedings in equity to compel defendant to remove obstructions to an ancient water course will be granted and damages awarded to an upper riparian owner, when it appears that such obstruction exists, and that the defendant by enlarging the conduits which it had laid to carry the water of the stream can prevent water from backing upon land of such riparian owner.

No. 901 January Term, 1906. In equity.

Opinion by YOUNG, J. Filed July 20, 1906.

This is a bill to compel the defendant company to remove certain obstructions to an ancient water course and to pay plaintiff damages suffered by reason of its obstruction.

From the evidence, we find the following facts:

FINDINGS OF FACT.

1. The plaintiff is the owner of certain lands described in the bill, through which has been accustomed to flow a small stream of water, fed by springs and by the water from rainfalls upon the surface of about 130 acres adjacent to the stream.

2. The defendant corporation has obstructed this stream or ancient water course by depositing culm and refuse from its coal works in the stream, but defendant has constructed through the culm pile deposited in and about the water course two 36 inch terra cotta pipes and piled on and around these pipes culm to the depth of 50 feet and length of 200 feet.

3. Defendant, by its obstruction of the water course, has caused the water in times of sudden freshets or heavy rainfall to back up and flow upon and over plaintiff's land, thereby preventing his use of the land for gardening purposes and destroying such crops as has been planted there.

4. The defendant can by proper repair of the conduits it has built and by enlarging the entrance to the conduits and by keeping the same free and unobstructed from waste and floating material, carry off all the water which may flow through the water course at the time of any ordinary freshet or rainfall.

5. Plaintiff has suffered some damage or loss during the years 1901 to May, 1906, inclusive, by reason of the obstruction of the water course by defendant, but there is no very accurate evidence of the amount of the damage; but from the evidence we find that his loss would be fully compensated by the payment of the sum of fifty dollars.

CONCLUSIONS OF LAW.

We conclude as matter of law as follows:

1. That the stream flowing through plaintiff's land and which the defendant has obstructed, is an ancient water course.

2. That by reason of the obstruction of that water course by defendant, plaintiff's land has been injured, and plaintiff has suffered loss for which defendant is liable.

3. That defendant should be required to

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repair the conduits placed by it in the water course, enlarge the entrance to and keep clear of refuse the conduits, so that they may carry off all the water accustomed to flow in the water course.

4. That defendant pay the plaintiff the sum of $50 and pay the costs in this case.

Let a decree be drawn accordingly.

For plaintiff, *E. E. Fulmer.*

For defendant, *C. M. Johnston* and *Elliot Rodgers.*

Court of Common Pleas No. 3,

ALLEGHENY COUNTY.

HERRON, Jr. vs. HOUSTON et al.

Party wall—Provision in deeds—Easement.

The owner of two adjoining lots conveyed one lot to A with a provision that if the wall extended beyond the line it should so remain and A should not be required to take it down. The adjoining lot was sold to B with a similar provision. Held, that the provisions of the deeds did not prevent B from exercising his right to erect a party wall.

No. 460 May Term, 1906.

Opinion by EVANS, J. Filed July 5, 1906.

OPINION.

Plaintiff alleges that he is the owner of a certain lot of ground in the 9th ward of the city of Pittsburgh described by metes and bounds, and that the defendants are the owners of an adjoining piece of property fronting on the same street; that the defendants and the plaintiff acquired title from a common ancestor, Thomas Mellon; that in the conveyance of the property of the plaintiff to his grantor the said Thomas Mellon covenanted and agreed as follows: "And in case said building is over twenty (20) feet in width and extends over the line of said lot next to Factory street, the wall so extending partly over said line shall remain so and be held as a party wall between this and the adjoining lot owner, so that said Kaye, his heirs or assigns, shall not be compelled to take it down past his own pleasure." And in the deed conveying the property of the defendants to their grantor the said Mellon used the following language: "In case the building erected on the adjoining lot now owned by me should extend over the line of said lot and upon the lot herein described, the wall of said building so extending on said line shall remain so and be held as a party wall between this and the adjoining lot owner; so that Kaye, his heirs or assigns, shall not be compelled to take down or remove said wall past his own pleasure." Plaintiff alleges that the wall is a good, sound, substantial and sufficient wall, that no part thereof has ever been taken down by him or any of his predecessors. Said defendants are about to take down the said wall and erect a party wall, under the provisions of the act of assembly of June 7th, 1895, entitled, "An Act to regulate party walls in cities of the second class." Plaintiff alleges that the aforesaid Act of Assembly is unconstitutional, null and void, because it provides for the taking of private property for private use, not even making provision for any compensation for damages. Plaintiff further alleges that it has become customary to erect steel frame buildings, and that the erection of this party wall would prevent the erection of a steel building. Similar acts of assembly providing for the erection of party walls have been declared constitutional, so that it would be a waste of time to cite authorities sustaining the constitutionality of the act in question. But it is claimed by the plaintiff that the provisions in the deed from Mellon to his grantees gives to this plaintiff and his assigns the absolute right to maintain this individual wall until he sees fit to tear it down. We do not think that the language justifies such a contention. It was evidently inserted for the purpose of giving Kaye, the grantee of the lot on which the house extended over on to the adjoining lot, an easement for the maintaining of that wall, but it was no such provision as would render void an act of assembly providing for the erection of party walls.

Demurrer sustained.

For plaintiff, *J. S. Ferguson*

For defendant, *Magnus. Pflaum.*

A consumer's right to maintain a suit to compel a water company to furnish water at rates stipulated in a contract with a municipality is upheld in Pond v. New Rochelle Water Co. (N. Y.) 1. L. R. A. (N. S.) 958.

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PITTSBURGH, PA., AUGUST 22, 1906.

Court of Common Pleas No. 1,

ALLEGHENY COUNTY.

KAUFMAN vs. PITTSBURGH AND CASTLE SHANNON RAILROAD COMPANY AND PITTSBURGH RAILWAYS COMPANY et al.

Railroads—Majority stockholders—Action of—Lease of franchises—Connecting lines—Act of February 17, 1870—Charter of Pittsburgh Railways Company.

The action of a majority stockholder of a railroad company (in this case a coal company) in voting for and ratifying a lease of the railroad to a street railway is not illegal, where it appears that in so doing no fraud or undue advantage is exercised, and that neither the coal company nor its officers, who are with one exception the officers and directors of the railroad company, will receive any special benefit therefrom. In the absence of fraud the action of the stockholders of the railroad company in refusing to lease for a greater amount and for a longer period to an individual is justified, where it appears that the proposed lease to the individual was a speculative one, while the railways company was able financially to carry on the business of the railroad.

The Pittsburgh and Castle Shannon Railroad Company, a corporation organized under the general railroad act of April 4, 1868, leased its road to the Pittsburgh Railways Company, a corporation incorporated by special act of assembly on May 25, 1871. One of the lines of the Pittsburgh Railways Company passed at a certain point within ten feet of one of the termini of the Castle Shannon road and at that point for a number of years there had been a transfer arrangement of passengers. On bill filed by a minority stockholder to have declared void the lease because, *inter alia*, it was beyond the power of either party to the lease to make it, was held: First, that the two roads were connecting lines within a fair interpretation of the act of February 17, 1870, which prohibits the leasing of one railroad by another, unless connected either directly or by intervening lines; and, held: Second, that by the special charter of the Pittsburgh Railways Company, its right of acquisition by lease of another road is not limited to a connecting line.

No. 839 September Term, 1905.

Opinion by MACFARLANE, J. Filed February 10, 1906.

1. The Pittsburgh and Castle Shannon Railroad Company, hereinafter called the Railroad Company, is a corporation organized under the general railroad act of April 4, 1868, P. L. 62, and having by the special act of February 21, 1872, P. L. 142, the right to own real estate and mine coal therefrom, and by the special act of April 5, 1873, P. L. 546, the right to construct an incline plane. The plaintiff was in August, 1905, and still is the owner of fifty shares of stock of the said company.

2. The Pittsburgh Railways Company, hereinafter referred to as the Railways Company, was incorporated by a special act of assembly, May 25, 1871, P. L. 1170, under the name of the "Surety Contract Company," subsequently changed to the present name, and its principal business is that of operating traction lines and passenger railways in the county of Allegheny.

3. The Pittsburgh Coal Company, hereinafter referred to as the Coal Company, is a corporation under the laws of the state of New Jersey, having its principal office in the city of Pittsburgh, Allegheny county, and is engaged extensively in the mining and selling of coal in the said and adjacent counties; and it is the owner of 7756 shares of the stock of the Pittsburgh and Castle Shannon Railroad Company, out of a total of 9628 shares.

4. The board of directors of the Railroad Company, ten in number, is with one exception composed of officers and directors of the Coal Company, and the Railroad Company has been for several years controlled and managed by the Coal Company.

5. The executive officers of the Railroad Company, its superintendent, engineer, and accounting officers, were officers in a similar capacity of the Coal Company, which charged the Railroad Company for their services a reasonable amount, and the operating expenses of the Railroad Company were, in this respect, much less than they would have been if independently officered.

6. The railroad operated by the Railroad Company extends from Arlington station, Scott township, Allegheny county, to a point on Bailey avenue in the thirty-second ward in the city of Pittsburgh, and then by an incline plane with the road running from Bailey avenue to Carson street, in the city of Pittsburgh. It also owns and operates coal mines in Scott township. Prior to January 1, 1893, the railroad ran by a horseshoe curve

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track north of Washington avenue, in the thirty-second ward in the city of Pittsburgh, via a coal tunnel and coal incline to Carson street in the thirtieth ward, Pittsburgh, where there was and is now located a coal yard of the Railroad Company. About the last mentioned date the company constructed a shorter and more direct line, diverging from the former route at a point near Washington avenue in Montooth borough, and by incline planes reaching Carson street at a point adjoining the coal yard. Upon the completion of the new short line, the horseshoe curve track, coal tunnel, etc., were used solely for the transportation of coal from the mines of the company to the yard, and were not used for the transportation of freight and passengers except on several occasions prior to the year 1900. Passengers were so transported on account of accidents to the incline planes on the shorter route, which from January, 1893, was used exclusively for passengers and freight, and became the main line of the railroad. The horseshoe curve portions of the track were used in connection with the coal yard as a part of the terminal facilities of the Railroad Company in its mining and shipping of coal.

7. On July 13, 1904, the Railroad Company leased to the Coal Company, at $30 a m onth, for the term of three years from July 1, 1904, a lot which had been used as a dump for refuse, and the Coal Company erected thereon a laboratory for its use and the use of the Railroad Company.

8. For some time prior to any negotiations for the lease in this case the Coal Company had erected telephone wires, at its expense, along the right of way of the railroad, and this line was used by the Coal Company and the Railroad Company without charge to the latter.

9. The Coal Company has, and has had, no agreement or understanding with the Railroad Company for the use of the horseshoe curve portion of the tracks, and has not, at any time, used these tracks or any part thereof, and it does not own, control or operate in any way any mines or other property on or near the line of the Railroad Company.

10. The Railroad Company was, in August, 1905, and had been for several years previous, insolvent. Its coal property was valuable and was capable of being operated with profit, but the railroad had for a long time been operated at a loss of more than $3,000 a month, which was almost an offset to the earnings of the coal business of the company.

11. During the months of July and August, 1905, the Railroad Company began negotiations with one Baxmyer, for the lease of the railroad, and a meeting of the stockholders of the Railroad Company was called on August 16, 1905, for the purpose of considering a proposition for the leasing or selling of certain of its property, and there was then presented to the stockholders a resolution authorizing the execution of a lease in the form appearing as "Exhibit 1," in the plaintiff's bill, which is made a part of this finding, and it was then stated that the proposed leesee was the Railways Company and that the proposed lease was in pursuance of a resolution of the board of directors made on July 21, 1905. Objections were made by some of the stockholders, including the plaintiff, and a verbal offer was made to take a lease at the rent of $20,000 per annum. The meeting adjourned to August 17, at which time William Kaufman, acting on behalf of a principal whose name he refused to disclose but with whom the plaintiff had no privity, but who was some time after the execution of the lease disclosed to be Robert C. Hall, a broker and promoter of the city of Pittsburgh, offered in writing ("Exhibit F") that he (Kaufman) would on or before August 24th, bid at least $17,500 for the lease in the same form as that submitted, and as evidence of his good faith he deposited three bonds of $1,000 each. The meeting was adjourned to August 24th, at which time Kaufman did bid $17,500 per annum for the lease for a term of ninety-nine years and for a further term of ninety-nine years at $20,000 per annum. This bid was in writing, a true copy of which is attached to plaintiff's bill as "Exhibit 2," which is made a part of this finding. The said bid was not submitted for the consideration of the stockholders, for the reason that the identity of the principal was not disclosed, although demanded, and it appeared on the bid that there was no corporation competent to take the lease; and it was known by the directors and by the plaintiff and most of the stockholders present that the Railways Company was ready and willing to execute the lease, and that it was a strong corporation, of a good credit, and capable of carrying out the terms of the lease.

12. The action of the Coal Company as a a majority stockholder, and of the officers of the Railroad Company, in voting for the lease and in subsequently executing it, was

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prudent and in good judgment and was advantageous to all of the stockholders, and the refusal of the Kaufman bid was in good faith and in the exercise of good judgment. It developed upon the trial of this case that Mr. Hall had no connection with or control over any corporation capable of taking a lease, and his purpose in desiring to acquire the lease was simply as a speculation.

13. At the last mentioned meeting an election was had upon the proposed lease. The Coal Company cast its stock in favor of the resolution, and out of a total of 9628 shares 8153 shares were cast in favor to 66 against the resolution, the affirmative vote being composed of the stock of the Coal Company and its officers, directors and employees, with the exception of 350 shares, and of the 66 shares 50 were owned by the plaintiff and 16 by E. F. Hays.

14. Neither the Coal Company or any of its officers, nor any of its subsidiary companies or their officers, have received or will receive any pecuniary or other benefit or advantage in consideration of voting its stock in favor of the lease, except such benefits and advantages as accrue equally to all of the stockholders of the Railroad Company.

15. The lease dated August 25, 1905, was executed for the Railroad Company by its president on the morning of August 25th, and by its secretary in the evening of that day, and was executed by the Railways Company on August 26th; and as early as 12:25 P. M., August 25th, notice was served upon the Railways Company ("Exhibit D") by plaintiff, requiring the defendant not to execute the lease or to pay out any money on account thereof. This bill was filed on August 30th and served the same day. The Railways Company entered into possession, and since that time has been operating the portion of the railroad leased to it.

16. On or before September 1, 1905, the railroad of the defendant Railroad Company did not connect with nor intersect any other railroad nor physically with the road or railway of any street railway company, and the Railways Company did not own, control, lease or operate a railroad physically connected with that of the Railroad Company. The Railways Company's tracks are situated, with reference to the Railroad Company's tracks, at a number of points, as follows: at Carson street within 60 feet, at which point passengers have been for several years transferred between the respective companies under the terms in an agreement; at Bailey avenue within four or five feet; near Arlington avenue the railways tracks cross the railroad above grade; the Washington avenue line parallels the railroad for more than a quarter of a mile, at a distance from 20 to 60 feet; at another point the lines are 150 feet apart, and the intervening land is leased by the Railways Company; from Arlington to Castle Shannon the lines parallel for about half a mile, at a distance from 25 to 200 feet; and in Castle Shannon a spur of the railroad extends to within 10 feet of the railways tracks. At all but one of these points the trans-shipment of passengers from one road to the other is easy and convenient.

CONCLUSIONS OF LAW.

1. There being no fraud or undue advantage, the lease is not void on that ground.
2. The lessor has not violated any duty to the commonwealth.
3. The lessee has the right to take the lease.
4. The lessor has the right to make the lease.
5. It is not necessary under the charter of the lessee that the lines be mechanically connected, and it is sufficient that they are in proximity so as to afford convenient transfer of passengers.
6 The bill should be dismissed at the costs of the plaintiff.

OPINION.

The question of fraud or of a disregard of the minority stockholders' rights has been disposed of by the findings of fact. It was assumed by the plaintiff's case as made by her that a lease was wise. As between the proposition of a lease for $15,000 to the Railways Company and one for $17,500 to some unknown person, there was but one course. The subsequent disclosure of the real bidder does not change the situation. We are examining the actions of the majority stockholders in the light of the facts as they stood when they cast their votes.

The only possible benefits or advantages to the Coal Company appear on the face of the bill, and it is clear that the reservation of the laboratory lot and the telephone lines was but a necessary ratification of existing arrangements, which were to the benefit of the Castle Shannon Company. As to the clause for the use of the horseshoe curve portion of the line [clause following (f) of the lease, p. 16 of the bill] the question is, Does this give to the Coal Company, the majority stockholder, any right enuring to its advantage over and above the advantage of the minority stockholder? The lessor could lawfully reserve that portion of the road for its own use, and that use could be limited to the hauling of coal. Had it done this, there could be no complaint by the plaintiff. The Coal Company has no rights over that piece of road, and cannot acquire any, without the action of the Castle Shannon Company. It secures no present advantage, but it might wish these rights in the future. By limiting the lessor's right of engaging in the hauling of coal to that of one possible, but not prospective

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customer, its majority stockholder, it is argued that it gains a special advantage. It is true it would have an advantage over other miners of coal in that district, but it would have no advantage over the plaintiff, for the reason that before it could obtain any right it must secure an agreement with the Castle Shannon, and if that agreement were unfair, she would have her remedy.

A part of the main line must be used to transport the Castle Shannon Company's coal. The lessee agrees to haul the coal mined by the lessor at a fixed rate, but does not bind itself to haul that of the Coal Company. The two clauses restricting the use of the reserved portion of the road and agreeing to transport the lessor's coal cannot be read together so as to give the Coal Company any rights for its coal. The right of the lessor is limited, and it may be that it would have been more to its advantage to have had no limitation, but that is not to the point. The plaintiff does not suffer from the conferring of any privilege upon the Coal Company.

The important questions in this case relate to the legality of the lease. By the withdrawal of the 19th request for findings of fact, the plaintiff abandons the position that the Charleroi line controlled by the Pittsburgh Railways Company, is a parallel and competing line. As it is a street railway, it is not within the constitutional prohibition: *Gyger* v. *Philadelphia Railway Company*, 136 Pa. 96.

Under the general railroad act of 1868, P. L. 62, under which it was incorporated, the Railroad Company did not have the right to engage in the mining of coal. Its duty to the public was that of a common carrier under the act of 1849 and its supplements, and it could not abandon them. That duty was to be performed between its termini, and when it substituted a more direct line for a portion of its route; it had a right to abandon the older piece. This is done frequently in cases of straightening and widening under the act of 1869, P. L. 12, and the act of April 3, 1872, P. L. 35, expressly confers the right to retain and use a portion or all of the old road in the discretion of the president and directors. The horseshoe curve portion of this road was retained, but not as a part of the main line and not for the purposes of general transportation of passengers and freight, but as a coal road. It became nothing more than a branch line, and by its restricted use the public interests were not harmed nor are they by the reservation in the lease. The company by the amendment to its charter by the special act of 1872, P. L. 142, was given the right to mine coal. Retaining its coal it has a right to mine it and to use its coal road, while at the same time its lessee serves the public over the main line.

The Pittsburgh Railways Company has the right to acquire by purchase or lease and to operate a railroad. Its charter is similar to that of Philadelphia, Reading, Pennsylvania and International Navigation Companies. Its right of acquisition is not limited to a connecting line. It may purchase or conduct in its own name any work or works public or private which may tend to or be designed to improve, increase, facilitate or develop trade, travel or the transportation of freight, livestock, passengers and any other traffic by land or water, and, by another section, "to purchase, make, use and maintain any works or improvements, connecting or intended to be connected with the works of the said company, and to merge or consolidate or unite with the said company, the improvements, property and franchises of any other company or companies, on such terms and conditions as the said company agree upon."

This special power is not conferred and is not restricted by the limitations of the general railroad acts of 1861 and 1870.

No doubt the Castle Shannon Company could not lease to another railroad company chartered under the general railroad laws unless the lines were connecting within the meaning of the act. In dealing with another such company its rights are restricted, but it is here leasing to a company upon whose powers there are no such limitations. Can it be said that the Railways Company's broad powers of acquisition by lease cannot be exercised because the other party may not lease to a differently constituted company except under certain conditions. We think not. In *Pinkerton* v. *Traction Company*, 193 Pa. 229; Justice Mitchell said: "Nor is there any weight in the objection that the passenger railway had no power to lease its road. The power to take a lease is expressly given to the motor companies and the corresponding power in the passenger railway companies as owners to give a lease is necessarily implied."

The validity of the special act is established in *Hespenheide's Appeal*, 4 Pennypacker, 71; and *Carothers* v. *Philadelphia Company*, 118 Pa. 468. Its terms, as we have in part quoted them, do not restrict. They enable the company to acquire not only works or improvements connecting or intended to be connected with the works of the said company, but also to purchase and operate any works which may facilitate, improve or increase travel, etc.

This view of the case renders unnecessary an extended discussion of the meaning of "connecting" under the general acts. Even if the power of leasing under the special act be restricted to works or improvements connecting or intended to be connected with the works of the company, the language is much broader than that of the act of 1861, "that the roads * * * * * * shall be directly or by means of intervening railroads connected with each other," and of the act of 1870, "connected, either directly, or by means of intervening lines * * * * * * and thus forming a continuous route or routes for transportation of persons and property." It has been held that there is a connection, although the difference in gauge rendered the passage of cars impracticable; *Philadelphia & Erie* v. *Catawissa R. R.*, 53 Pa. 20; and although passengers must change cars at an inclined plane, *Hampe* v. *Traction Co.*, 165 Pa. 468.

We find no inconsistency or repugnancy between the general and special acts that would cause the former to operate as a repeal of the latter.

For plaintiff, *William Kaufman.*

For defendant, *Reed, Smith, Shaw & Beal*, and *Elliott Rodgers.*

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PITTSBURGH, PA., AUGUST 29, 1906.

Court of Common Pleas No. 1,

ALLEGHENY COUNTY.

KAUFMAN vs. PITTSBURGH AND CASTLE SHANNON RAILROAD COMPANY AND PITTSBURGH RAILWAYS COMPANY et al.

[For syllabus see preceding case]

No. 839 September Term, 1905. Sur exceptions.

Opinion by MACFARLANE, J.

The powers conferred upon the Railways Company in taking a lease are found in Sec. 2 of its charter, as follows: "That the corporation hereby created shall have power to contract with any person or persons, firms, corporations or any other party, howsoever formed, existing, or that may hereafter exist in any way that said parties, or any of them may have authority to do, to build, construct, maintain or manage any work or works, public or private, which may tend or be designed to improve, increase, facilitate or develop trade, travel or the transportation and conveyance of freight, livestock, passengers and any other traffic, by land or water * * * * and also, to purchase, erect, construct, maintain, or conduct in its own name, and for its own benefit, or otherwise, any such work, public or private, as they may by law be authorized to do * * * * *;*" and in Sec. 4, as follows: "and to purchase, make, use and maintain any works or improvements, connecting or intended to be connected with the works of the said company, and to merge or consolidate or unite with the said company, the improvements, property and franchises of any other company." Further consideration leads us to the conclusion that the right to take a lease is not conferred by the second section. It gives the right to purchase, maintain or conduct in its own name and for its own benefit any such work, but it is not clear that this means to take a lease. The fourth section, however, by necessary implication creates the power, and it follows that the lease must be of works "connecting or intended to be connected with the works of said company." This language, as we have said in our former opinion, is broader than that of the general acts of 1861 and 1870, which requires the connection to be either "directly or by means of intervening lines," the latter act adding, "thus forming a continuous route or routes for transportation of persons and property." The Castle Shannon Company being incorporated under the general railroad act can, so far as the express terms of its charter confers the power, lease only to such connecting lines as form a continuous route.

While it is true that the present Chief Justice in the opinion in *Hampe* v. *The Traction Company*, says that "the question does not arise in the present case," he does say, "But we are not prepared to say that even under the act of 1870 an absolute passage of the same car from one road to the other without break or interruption, is necessary to constitute a "continuous route." The reasoning of the court in *Philadelphia & Erie* v. *Catawissa R. R.*, 53 Pa. 20; is against such a construction, and, as already noted, time and experience have amply vindicated the wisdom of a broad interpretation of the statute in furtherance of its real object, the facilitation and convenience of travel and transportation."

As we have found in the sixteenth finding of fact, passengers have been for several years transferred from the Castle Shannon road to that of the Railways Company at Carson street under an agreement between the two companies, and at what is practically the terminus of the railroad, the village of Castle Shannon, the lines are but ten feet apart. To hold that they are not connecting lines is to place a narrow instead of a broad construction upon the statutes, and this is not required by the principles laid down in

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Van Steuben v. *The Central R. R. Company*, 178 Pa. 367; and kindred cases.

After a full consideration we have dismissed the exceptions as to findings of fact. However we may have termed it in the three places in which we have been obliged to try to define the powers of the Castle Shannon Company as a miner of coal, the fact is that the company has the right to own coal mines, to operate them and to sell and dispose of the coal. Practically this is the power of a "private coal company."

For plaintiff, *William Kaufman.*

For defendants, *Reed, Smith, Shaw & Beal* and *Elliott Rodgers.*

Court of Common Pleas No. 2,

ALLEGHENY COUNTY.

MITCHEL et al. vs. CLARK.

Real estate—Sale of—Statute of frauds—Mutuality of agreement.

An agreement to sell property not signed by all the owners lacks mutuality, and will not be enforced under the statute of frauds, or in equity.

An agreement to sell a house which is subject to the servitude of support to adjoining houses will not be enforced in equity.

No. 1028 April Term, 1906.

Opinion by YOUNG, J. Filed June 30, 1906.

This was a bill filed by the vendors against the vendee to compel the specific performance by the vendee of a contract for the sale of real estate situate in the city of Pittsburgh. From the pleadings and evidence, we find the following facts:

FINDINGS OF FACT.

1. The plaintiffs, through their agent, L. A. Clark & Company, and the defendant, on November 3, 1905, entered into a written agreement for the sale by plaintiffs to the defendant of a certain lot situate in the 2d ward of the city of Pittsburgh, of which the following is a copy:

"PITTSBURGH, PA., November 3, 1905.

"$500.00.

"RECEIVED, of J. M. Clark, the sum of five hundred ($500) dollars, as part of the purchase money for the purchase of,

"All that certain lot or piece of land, with improvements thereon, situate in the second ward of the city of Pittsburgh, county of Allegheny, state of Pennsylvania, said lot or piece of land lying on the easterly side of Second avenue and fronting thereon twenty feet and extending back, preserving an even width throughout, sixty feet to Hoag alley, bounded on the south by the property now or late of M. H. Rodgers, and on the north by property now or late of L. B. Rodgers, having erected thereon a three story brick dwelling, which property is known and designated as No. 421 Second avenue, for the price or sum of $31,200, payable as follows:

"The sum of $10,000 of which the above $500 is a part, upon delivery of Deed of General Warranty on or before January 3, 1906, and the further sum of $10,700 to be secured by Bond and Mortgage, which Mortgage shall run for a period of two years from the date thereof, and to bear interest at six per cent per annum, payable semi-annually; the purchaser, however, to have the privilege to anticipate payment of part or all of said mortgage at any interest paying period, and the balance, $10,500, which is now a mortgage lien against said property, to be assumed and paid by the purchaser, the assumption of which mortgage is part of the consideration or purchase money therefor.

"Possession to be given to the above mentioned property upon delivery of Deed of General Warranty on or before January 3, 1906.

"The hereinabove described property, however, is accepted by the purchaser, subject to the right of the present tenant, which lease expires April 1, 1906.

"The seller to pay all taxes for 1905.

"The above mentioned property shall be free and clear of all liens and encumbrances, and the hand money shall be refunded if the title should not prove good upon examination of the records, or cannot be made good by the seller.

"It is further agreed and understood that the purchaser of the above described property shall accept said property subject to a certain ground rental, which ground rental is an amount of $46.25 per annum, and which ground rental is held by the Western University of Pennsylvania.

"It is further agreed and understood that L. A. Clark & Company shall receive $600 as compensation for their services in negotiating the above mentioned sale, to be paid by the seller.

"This contract of agreement is mutually binding upon our heirs, executors, administrators, and assigns. "L. A. CLARK & COMPANY,

ZINN.

"The above receipt and contract is hereby agreed to and accepted in all its terms and conditions, and the agreeement is evidenced by the signature hereto of the owner of the above mentioned property.

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"Witness our hands and seals the day and date first above written:

	"James M. Clark,	[Seal]
"W. A. Zinn,	"Chas. E. Mitchel,	[Seal]
"	for the heirs of John J. Mitchel.	
"	"M. E. Mitchel,	[Seal]
"	"Anina J. Mitchel,	[Seal]
"	"Eleanor V. Mitchel,	[Seal]
"	"Agnes Mitchel,	[Seal]
"	"Augusta J. Mitchel,	[Seal]
"	"Frank F. Mitchel,	[Seal]
"	"Annie M. Dienelt,	[Seal]
"	"Wm. R. Mitchel,	[Seal]"

2. At the time of the sale the lot was owned in fee as tenants in common by the following persons: Mary E. Mitchel, Charles E. Mitchel, Henry N. Mitchel, James A. Mitchel, William R. Mitchel, Lawrence A. Mitchel, Frank F. Mitchel, Agnes C. Mitchel, Eleanor V. Mitchel, Augusta J. Mitchel, Anina J. Mitchel, Walter E. Dienelt, Annie M. Dienelt.

3. The agreement was not signed by Henry N. Mitchel, James A. Mitchel and Lawrence A. Mitchel, three of the plaintiffs having interests in the real estate described in the bill, and no person had written authority to sign said contract for them.

4. The house erected on the lot described in the bill is subject on each side to servitudes for the support of the adjoining houses, by reason of the fact that on each side the wall between the house in question and the adjoining house is common to both houses, and by lapse of time said servitudes for support have been created, and said servitudes were unknown to defendant until after the execution of the contract and are material injuries to the value of the premises in question.

5. The lot described in the bill is encumbered by a mortgage made by W. E. Dienelt and Annie M., his wife, one of the owners of the lot, to Douglas Stewart, dated the 4th day of April, 1905, recorded in the office of the Recorder of Deeds of Allegheny county, in Mortgage Book Vol. 1174, p. 530, conditioned for the payment of the sum of $1,500 on the 4th day of April, 1907, with interest semi-annually.

6. That before defendant executed the contract he inquired of W. A. Zinn, representing L. A. Clark & Company, the plaintiffs' sales agent, whether or not the house mentioned in said contract was used for immoral purposes, and stated that he, defendant, did not want it if it was. Thereupon said agent assured him that said house was not used for immoral purposes, and defendant relying upon such assurance of plaintiffs' agent and not knowing to the contrary executed said contract. That the representation of the agent was not true, and the house was at the time of said inquiry, and had been for at least a year, used for immoral purposes and was a bawdy house, and that the representation of the agent was a material inducement to defendant to execute said contract.

7. Henry N. Mitchel, one of the tenants in common, died intestate since the filing of the bill, and no letters of administration have been granted upon his estate.

We conclude as matter of law:

CONCLUSIONS OF LAW.

1. That under the statute of frauds said contract could not be enforced against the plaintiffs because it is not signed by Henry N. Mitchel, James A. Mitchel and Lawrence A. Mitchel, and there is no written authority by them or any of them to any person to sign the same for them.

2. That by reason of the failure of said Henry N. Mitchel, James A. Mitchel and Lawrence A. Mitchel to sign, and the absence of authority to sign for them, said contract is without a mutuality, and under the rule of equity there can be no decree against defendant for specific performance.

3. That the false representation set forth in the sixth finding of fact having mislead the defendant, there can be no decree against him for specific performance.

4. That the mortgage of $1,500 set out in the fifth finding of fact is not of sufficient importance to prevent specific performance, and may be provided for by deduction from the cash purchase money.

5. That the servitudes set out in the fourth finding of fact constitute a good reason for denying specific performance.

6. That the death of Henry N. Mitchel since the filing of the bill, and after the execution of the deed of all his interest in the property and delivery of such deed in *escrow*, will not defeat plaintiffs' right to specific performance.

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7. That under the pleadings and evidence, the bill should be dismissed.

Let a decree be drawn accordingly.

For complainant, *McKenna & McKenna.*

For defendant, *C. C. Dickey* and *James M. Clark.*

Court of Common Pleas No. 3,

ALLEGHENY COUNTY.

HAPPY vs. HAPPY.

Divorce—Adultery—Exposing to lewd company.

In a suit for divorce on the ground of adultery, the evidence showed that libellant had exposed his wife to lewd company, whereby she became ensnared, etc. Held, the divorce should be refused.

No. 262 February Term, 1905. In divorce.

Opinion by McCLUNG, J. Filed May 15, 1906.

There is no evidence to support a decree in this case on any other ground than that of adultery. The conclusion arrived at by the Master to the effect that respondent has committed adultery, has sufficient evidence to support, and is probably the most reasonable conclusion from the testimony adduced.

If, however, we adopt his theory, i. e.: give credence to the testimony which indicates such guilt, and add to this other undisputed facts in the case, we are inevitably led to the conclusion that the plaintiff, (the husband), "exposed his wife to lewd company, whereby she became ensnared, etc.," and this is a bar to the divorce.

And now, to wit, May 15, 1906, it is ordered that the decree prayed for be refused and that the libel be dismissed at libellant's cost. BY THE COURT.

For plaintiff, *R. P. Lewis.*

For defendant, *Edward C. Chalfant.*

BATHING RESORT—CARE REQUIRED.

The defendant company maintained a bathing resort on the shore of the Great Salt Lake to which the public was invited for an admission fee, but took no steps to mark safety limits or to provide for the rescue of bathers, and, on being notified that intestate was in danger of drowning and was missing, sent no one in search or to his relief until several hours had elapsed. It was held that defendant was guilty of such negligence as warranted a recovery for decedent's death; *Larkin* v. *Saltair Beach Company*, 83 Pac. Rep. 686 (Utah, Sup. Ct., Dec. 26, 1905).

Mr. Justice McCarty delivering the opinion of the court said in part:

It is well settled that the owners of resorts to which people generally are expressly or by implication invited to come are legally bound to exercise ordinary care and prudence in the maintenance and management of such resorts to the end of making them reasonably safe for the visitors. And when the business is that of keeping or carrying on a bathing resort, the authorities hold that the proprietors or owners thereof are not only required to exercise that same degree of care and prudence with respect to keeping the premises in a reasonably safe condition, which the law imposes upon keepers of public resorts generally for the protection of their patrons but the law imposes upon them the additional duty, when the character and conditions of the resort are such that because of deep water or the arising of sudden storms, or other causes, the bathers may get into danger, of having in attendance some suitable person with the necessary appliances to affect rescues and save those who may meet with accident. Not only is it the duty of the owners of bathing resorts to be prepared to rescue those who may get into danger while in bathing, but it is their duty to act with promptness, and make every reasonable effort to search for, and, if possible, recover those who are known to be missing. * * * It cannot be held that decedent was guilty of contributory negligence, so long as he and his companions remained within the territory to which they, and the people generally, were invited to bathe, unless they, with knowledge or notice of the danger, put themselves in a position of peril, which was not shown or attempted to be shown at the trial. The undisputed evidence shows that when decedent and his companions discovered they were in danger they made every effort in their power to return to the pavillion.—*American Law Review.*

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EDWARD B. VAILL, THOMAS EWING, } EDITORS.

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PITTSBURGH, PA., SEPTEMBER 5, 1906.

Court of Common Pleas No. 2,

ALLEGHENY COUNTY.

PEOPLES TRUST COMPANY v. BUCHMANN et al.

Real estate—Joint purchase by husband and wife—Death of parents—Issue—Interest of.

Where the title to real estate intended to be conveyed to the wife is taken in the name of the husband and toward the payment of which the wife has paid part, an issue of this marriage is entitled to an interest in the real estate in proportion to the amount of the purchase price her deceased mother paid as against the children of the second wife of the husband who had died leaving it to be divided equally between all of them. This in addition also to the share of the daughter received under the will of her father.

No. 24 April Term, 1906.

Opinion by FRAZER, P. J. Filed July 10, 1906.

The purpose of this bill was to have defendants decreed as trustees of plaintiff minor for certain real estate situate in the 23th ward of the city of Pittsburgh. From the bill, answer and proofs, we find the following facts:

FINDINGS OF FACT.

1. Jacob Buchmann and Christina Rosch were married in the year 1885, and lived together as man and wife until the 13th day of July, 1893, at which time Mrs. Buchmann died, leaving to survive her her husband and two children, Elizabeth Buchmann, now eighteen years of age, and Albert Buchmann, who died in the year 1895, at the age of four years.

2. Subsequent to their marriage, on November 28, 1887, Buchmann purchased from Henry Schenck, and wife, the property on South 16th street, in the 28th ward of the city of Pittsburgh, the same being fully described in plaintiff's bill, for the consideration of $1,400, of which amount $100 was paid in cash and the balance which was secured by mortgage on the property within the next three or four years.

3. Of the purchase money above referred to, Mrs. Buchmann, contributed the $100 hand money and the further sum of $500 paid on the mortgage, out of her own separate estate, being a part of moneys received by her as an inheritance from the old country, the deed for the property being taken in the name of Jacob Buchmann, the husband, who made all other payments except those mentioned above.

4. On March 29, 1894, Jacob Buchmann and Carolina Buchmann were married, and Emma Buchmann and Catherine Buchmann are the issue of that marriage.

5. Jacob Buchmann died on the 8th day of May 1904, leaving to survive him his widow, Carolina Buchmann, and three children, viz: Elizabeth Buchmann, the plaintiff; and Emma Buchmann and Catherine Buchmann, defendants. By his will, which was dated the 17th day of June, 1896, decedent devised all his real estate, including the property on South 16th street to his widow Carolina Buchmann for life, and at her death to his three children, share and share alike.

6. The intention of the parties was that the 16th street property should be purchased and owned by Mrs. Buchmann. The title, however, was taken in the name of Jacob Buchmann without the knowledge or consent of his wife, and subsequently when she discovered that fact, her husband promised and agreed with her that the title thereto should become vested in her children either by will or by deed from him.

7. Defendant's contention is that the purchase money for the property was paid by Jacob Buchmann out of his own funds and that if any portion of the funds of his wife were invested therein the same were loaned to her husband. No evidence was offered tending to establish a loan.

CONCLUSIONS OF LAW.

1. It clearly appears from the evidence that Mrs. Christina Buchmann received from Europe on account of an inheritance, on

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April 17, 1885, the sum of $164.67, and on December 27, 1887, the sum of $536.80. Of the latter sum, $500 was paid by her on account of the purchase money mortgage against the property in dispute on the same day she received her money. Of the other amount, in view of Jacob Buchmann's statements made in 1885, that his wife had made all payments on the property and "had enough left to buy herself a black dress," it may be reasonably inferred that the $100 hand money was also paid by her out of her own funds. The evidence shows no other payments by Mrs. Buchmann. We must therefore assume the balance was paid by Mr. Buchmann. It also appears that the intention of the parties was that Mrs. Buchmann should become the purchaser and that Mr. Buchmann agreed to transfer the title to the property to either Mrs. Buchmann or her children. Under these circumstances plaintiff is entitled to the relief prayed for to the extent that her mother contributed her separate funds in payment of the property.

We have found as a fact that Mrs. Buchmann contributed $600 of the consideration. Plaintiff is therefore entitled to a six-fourteenths interest in the property on account of that payment and a one-third interest in the balance under the will of her father, or thirteen twenty-firsts of the entire property.

Let a decree be drawn accordingly.

For plaintiff, *W. H. Lemon.*

For defendant, *George L. Sutter.*

(Common Pleas No. 2, Allegheny Co.)

MINTEER vs. BRICKELL et al.

Mortgage—Bill for satisfaction of—Proof—Costs.

A bill to compel defendants to satisfy a mortgage and deliver for cancellation the accompanying bond will be dismissed where the answer to the bill and the plaintiff has failed to make out his case by two witnesses or by one witness and strong corroborative circumstances. Where plaintiff's equities are strong, however, the court, as in this case, will be justified in placing the costs on the defendant and holding him to an offer in the answer to satisfy the mortgage and surrender the bond upon plaintiff perfecting title to certain of the land covered by the mortgage.

No. 498 October Term, 1905. In equity.

Opinion by YOUNG, J. Filed July 12, 1906.

This is a bill for an njunction and to compel the defendants to satisfy a certain mortgage and deliver up for cancellation the accompanying bond. From the pleadings and evidence, we find the following facts:

FINDINGS OF FACT.

1. The defendants, by their deed dated September 9, 1901, and of record in the Recorder's office of Allegheny county, in deed book vol. 1147, p. 551, conveyed to the plaintiff a certain tract of land containing 115 acres and situate partly in the 21st ward of the city of Pittsburgh and partly in Sterrett township, for the sum of $87,500, the plaintiff paying in cash the sum of $10,000, and securing the balance of $77,500 of unpaid purchase money by his mortgage to defendants, dated September 9, 1901, and recorded in the Recorder's office of Allegheny county in mortgage book 971, p. 686, payable in three years from date with interest at five per cent, payable semi-annually.

2. The mortgage contained, *inter alia*, the following provision:

"With privilege to first party of having released from the lien of this mortgage any lot or lots, upon the payment to the second parties of $20 per foot front for each lot so released, together with accrued interest upon the sum so paid; said release to be based upon the frontage as shown in a certain plan laid out by S. H. Ralston, C. E., and approved by the city engineer."

3. It appears from the evidence in this case that the land set out in the first finding of fact had been plotted by said Ralston at the request of the defendants prior to the execution and delivery of the deed and mortgage aforesaid, and that subsequently said plan or plot was put on record in the Recorder's office of this county in plan book vol. 20, p. 4, and shows lots numbered from one to one hundred eighty, both inclusive, and various streets laid out upon which the lots abut or front.

4. The plaintiff paid to defendants $20 per foot front on the following lots in said plan: 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12,

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13, 29, 30, 31, 32, 33, 34, 35, 36, 37, 38, 39, 40, 45, 46, 47, 48, 49, 51, 52, 53, 54, 55, 56, 57, 58, 59, 60, and thirty feet of lot 41, being forty-one in all, and had all released, except the rear part of lots Nos. 30, 31, 32, 33, 34 and 35. That the sum thus paid amounts to $23,340, with interest thereon, being a reduction of the mortgage debt in that sum.

5. The plaintiff having made default in the payment of interest on the mortgage, a *scire facias* was issued by the defendants on January 21, 1903, at No. 268 April Term, 1903, but no judgment has been taken thereon. Of the money paid per foot front, $3,500 was paid before the issuing of the writ and the balance, namely, $19,840 afterwards.

6. After the payment of said sum of $19,840 with interest, plaintiff proposed to re-convey to defendants all the lots covered by the mortgage then unsold, and thereby save the necessity of selling out the lots upon the *scire facias*.

7. The defendants furnished to their attorney the data for drawing the deed, and when it was drawn it was given to the plaintiff for signature by himself and wife. After the execution of the deed by plaintiff and wife, it was delivered to the defendants; it is dated August 18, 1903; acknowledged October 28, 1903; recorded June 16, 1904, in deed book vol. 1319, p. 558; the consideration being one dollar and other good and valuable consideration. The deed grants to the defendants all of the lots in the plan, but excepts and reserves thereout and therefrom however, all the following lots numbered 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 29, 30, 31, 32, 33, 34, 35, 36, 37, 38, 39, 40, 45, 46, 47, 48, 49, 51, 52, 53, 54, 55, 56, 57, 58, 59 and 60; also a lot thirty feet front on Mount Vernon street, being the easterly end of lot No. 41 in the said plan, being the lots upon which $20 per foot front had been previously paid.

8. The plaintiff, at various times, after the delivery of the deed, requested the attorney for the defendants to have the mortgage satisfied, but the defendants neglected so to do; matters continued in this way until August, 1905, when the defendants requested the plaintiff to re-convey to the defendants a portion of the lots which had been excepted from ths said deed to them, and the title to which remained in plaintiff, and upon the plaintiff refusing, the defendants threatened to use the said bond and mortgage to obtain title to said portion; thereupon the bill in this case was filed.

9. The land that remains in plaintiff under the reservation in the said deed from the plaintiff to the defendants, is a small triangle in the rear of lots Nos. 29, 30, 31, 32, 33, 34, 35, 36, 37 and 38.

CONCLUSIONS OF LAW.

We find the following conclusions of law:

In view of the well established principle in equity that the oath of the defendant which is directly responsive to and in denial of the allegations of the bill must stand unless denied by two witnesses or one witness and strong corroborating circumstances, we think the plaintiff has failed to establish the fundamental allegation as set out in the third paragraph of his bill, namely, "said defendants and your orator entered into an agreement by which your orator was to re-convey to defendants all the land covered by said mortgage except those lots upon which $20 per front foot had been paid to defendants as required by said mortgage, the consideration of said conveyance to be the satisfaction of said mortgage given as aforesaid and the delivery to plaintiff of his said bond," and the bill must therefore be dismissed.

DISCUSSION.

The pivotal allegation of plaintiff's bill is that the defendants, after the issuance of the *scire facias*, in consideration of the reconveyance to them of all the lots covered by the mortgage, except those upon which $20 per foot front had been paid, agreed to satisfy the mortgage and deliver up plaintiff's bond to him. This allegation is directly met by the defendants in the fourth paragraph of their answer, where they say, "the allegations as to the deed and its contents made in the fourth paragraph of bill of plaintiff, are admitted; but it is denied that such deed was executed in pursuance of any agreement made by or on behalf of defendants, said deed being made and executed wholly on the suggestion of plaintiff." De-

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fendants, for further answer, say that "at the time plaintiff made the offer to re-convey and defendants accepted said offer, it was upon the express understanding that all property covered by the mortgage remaining unsold was to be reconveyed by the plaintiff and the deed executed by the plaintiff and accepted by the defendants contains the following as showing that understanding, 'the lots so excepted and reserved being the lots in said plan heretofore sold by the grantor herein,' and it was only a clerical error resulting from oversight in drawing said deed that it did not except parts of lots Nos. 29 to 38 both inclusive."

The plaintiff failed to produce any witness other than himself as to the agreement as alleged by him, and even his own testimony is not very definite as to what the real agreement was. There are no corroborating circumstances, except the circumstance that the triangular portion of lots 30 to 35 was included in the general reservation of those lots in the deed of re-conveyance by the plaintiff to the defendants. We must therefore adhere to the rule, that the answer having been responsive to this pivotal allegation of the bill, the plaintiff has not made out his case, and the sixth finding of fact must be in accordance with the agreement as asserted by the defendants. There is much equity in the plaintiff's case, and we have sifted the testimony and considered it very carefully in the hope that it would reveal some corroboration of the plaintiff's testimony, but have failed to find such corroborating circumstances. The equities of the plaintiff are so strong from the fact that the plaintiff paid to the defendants over $33,000 in cash, and re-conveyed to them 140 out of the 180 lots in the plan, that we feel justified in placing the costs of this proceeding upon the defendants, and also in holding the defendants to the offer made by them in the fifth paragraph of their answer that upon the perfecting of the title to the triangular strip the defendants are ready and willing to satisfy the mortgage and surrender the bond to the plaintiff.

Let a decree be drawn dismissing the bill unless the plaintiff shall convey to the defendants the triangular strip of ground being a portion of lots 30 to 35 inclusive, and upon such re-conveyance being made by plaintiff to defendants, that the defendants satisfy the mortgage of record and deliver up to plaintiff his bond, and that the costs of this proceeding be paid by the defendants.

For plaintiff, *R. A. & James Balph.*

For defendants, *James M. Shields & A. B. Angney.*

Court of Common Pleas No. 1,

ALLEGHENY COUNTY.

DIPPLE vs. DIPPLE.

Divorce—Alimony pendente lite—Power of court to enforce payment by attachment after dismissal of libel.

The court may enforce payment of alimony granted *pendente lite* in a divorce proceeding by attachment, even after a dismissal of the libel.

No. 746 December Term, 1903. Rule for attachment.

Opinion by MACFARLANE, J. Filed March 9, 1906.

We have heretofore refused to issue an attachment after a decree in divorce to compel the payment of costs; *Merrington* v. *Merrington*, 12 Dist. Reps. 364; but we are of opinion that the payment of alimony may be so enforced after dismissal of the libel. The allowance of alimony *pendente lite* is not based upon the act of April 15, 1845, which refers to alimony allowed upon a decree of divorce *a mensa et thoro*, but it is a necessary incident to the jurisdiction; the order is interlocutory and is not a lien on real esate nor enforceable by execution, but the remedy is by attachment: *Grove's Appeal*, 68 Pa. 143 (1871). It was held in *Elmer* v. *Elmer*, 150 Pa. 205 (1892); that a *ca. sa.* was not an appropriate writ to enforce obedience to the order. There, after verdict for the libellant, a rule was taken to fix the amount of the alimony and made absolute, and, upon petition to the court for its process to compel payments, a *fi. fa.* and *ca. sa.* were issued. The Supreme Court said: "It was conceded by the learned counsel for the appellee that the *fi. fa.* may regularly issue and that the

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decree may be enforced by attachment, and while the *ca. sa.* may be set aside, we see no sufficient reason why the *fi. fa.* should not stand." *Grove's Appeal*, is not cited in the reported briefs of counsel, nor referred to by the court, and if both decisions stand, the execution must be confined to personalty only.

After a discontinuance the court may make an order for connsel fees and alimony; when done, it is a final decree, from which an appeal may be taken; *Borckman's Appeal*, 2 Walker, 285, Supreme Court (1885); and where, on the date that the jury fee was paid and judgment entered, the rule was granted for additional counsel fee and expenses, and was afterwards made absolute, it was held to be immaterial whether this order be made before or after judgment, and that the authority of the court did not cease after judgment was entered, and it is as much an incident of the judgment as of taxation of costs: *Rieder* v. *Rieder*, 21 Pa. 488 (1902). So, after a non-suit and the payment of costs, the court has power to make an allowance for traveling expenses incurred by the wife in attending the trial: *Fernald* v. *Fernald*, 5 Pa. 629 (1897). In *Power's Appeal*, 120 Pa. 320 (1889); a decree was granted the husband and connsel fees and alimony were refused. The Supreme Court reversed, dismissed the libel and made absolute the rule for counsel fees and alimony, and directed the court below to enforce the order.

The allowance is a necessary incident of the jurisdiction; it arises from the obligation of the husband to support the wife and from her necessity in procuring or defending her case; it is enforceable by attachment, not as for contempt but to compel payment; the order for payment may be made absolute after the litigation has terminated by decree, dismissal, discontinuance or non-suit; and it is our duty to enforce payment where the husband "faculties." The power to enforce by attachment existing *pendente lite* and the authority of the court not ceasing with the termination of the litigation, it follows that we may issue the writ.

The cases of *Chase* v. *Chase* and *Parfrey* v. *Parfrey*, 15 Dist. Reps. 131; cited by counsel for respondent, are, we think, in conflict with the decisions of the higher courts above referred to, and in view of the diversity of opinion in the lower courts, we have confined our citations to authoritative cases.

A rule for attachment was made absolute on February 14, 1905, and on the same day the case in divorce was upon the argument list and the testimony submitted. Decision of that case was deferred until after disposition of the rule. On April 27, 1905, we directed the defendant to pay $150 alimony, to be in full settlement of amount then due, but, upon payment, the rule theretofore made was to be discharged. Payment was made on May 3, 1905, and the record in the divorce proceeding was thereafter examined, and on June 17, 1905, decree refused on the ground that the testimony showed desertion and not cruel and barbarous treatment. The libellant now asks for the payment of alimony between May 3d and June 17th.

There may be a change in the husband's circumstances since February, 1905, and another action has been begun by the wife in this court, in which a rule for counsel fees and alimony was granted after this opinion was prepared. For this reason, we make this order:

Now, March 9, 1906, the attachment asked for is refused for the present, with leave to libellant to set the rule down upon the argument list to be heard with her rule in the other case.

For libellant, *Henry Meyer.*

Court of Common Pleas,

CRAWFORD COUNTY.

TITUSVILLE v. AMERICAN EXPRESS COMPANY.

Taxation—Municipalities—Express companies—Interstate commerce.

A municipality may impose a tax on the domestic business of an express company, although, notwithstanding the fact that the principal business of the company is interstate.

No. 20 September Term, 1902. Sur rule for judgment for want of sufficient affidavit of defense.

Opinion by THOMAS, P. J. Filed April 14, 1905.

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The defense set up in this affidavit raises the question of plaintiff's right to assess the taxes sued for upon defendant, and alleges that its business is principally interstate and but a small portion thereof is domestic, and that the assessments made were assessed against it generally, including its interstate business, and not on the basis of its domestic business alone for the periods covered.

The statement alleges that the tax was based exclusively upon the amount of business transacted by it at Titusville and between Titusville and other points within the state of Pennsylvania. Whatever effect the averment and denial may have, it does demonstrate the fact that, at least, some of the business done by defendant was intrastate. It was insisted, upon argument that this is an attempt to tax interstate commerce, and a number of cases were cited to sustain the contention.

The case of *Philadelphia and Southern Steamship Company* v. *Pennsylvania*, 122 U. S. 326; was one where the state of Pennsylvania undertook, by virtue of an act of assembly, to levy a tax upon the gross receipts of the the plaintiff company, which transported goods and persons between the different states and the states and foreign countries. The act was very properly held as unconstitutional, as it attempted to regulate interstate and foreign commerce.

The case of *Leloup* v. *Port of Mobile*, 127 U. S. 640; arose under an ordinance of the city of Mobile which imposed a tax on all telegraph companies, as a condition of their doing business within its jurisdiction, and it was held that such was an attempt to interfere with or regulate interstate commerce, though the court calls attention to the fact that the internal business of the company was subject to taxation, if such were done without the imposition of a tax upon the entire operations of the company.

The case of *Lyng* v. *Michigan*, 135 U. S. 161, was one of a sale of beer in the original package as imported from another state, and the attempt to regulate such sales has frequently been was unconstitutional as an attempt to tax interstate commerce.

The case of *McCall* v. *California*, 136 U. S. 104, was an attempt to collect tax on a railway agency established in San Francisco, for the purpose only of soliciting traffic to New York. It was held that such agency was engaged in interstate commerce, and that an act attempting to levy a tax thereon was unconstitutional as an attempt to tax interstate commerce.

The case of *Ficklin* v. *Shelby Co.*, 145 U. S. 1, is no departure from this line of decisions, for while it appeared that plaintiffs were general commercial agents, and the only business they had done the previous year was of an interstate character, yet they were demanding a license to do such business generally, and it was held that they were liable for such fee, as they were seeking to put themselves in a position to legally do a domestic business as well. The court intimates that it might have been different had they not undertaken to do a general commission business, but had simply transacted business for non-residents.

It is very clear from the foregoing, to which numerous other cases might be added, that the city of Titusville cannot impose a tax upon the interstate business of the defendant, but may it not impose a tax upon the domestic business transacted by the defendant, notwithstanding the fact that its principal business is interstate?

It is clear that this is a tax for general revenue purposes, and is a tax on the privilege of doing business, regulated by the amount of business done (*Clark* v. *Titusville*, 184 U. S. 329), and certainly must be regulated as to the amount of business by the business only upon which the city has authority to levy the tax.

In the case of *Pullman Co.* v. *Adams*, 189 U. S. 420, the state of Mississippi undertook to levy a privilege tax on plaintiff (which did a local domestic business, but whose principal business was interstate) based upon the number of cars run from one point to another within the state, and upon the distance run within the state, and the court held that such tax was valid and was not an interference with commerce between the states.

In *Allen* v. *Pullman's Palace Car Co.*, 191 U. S. 171, it was held that a state has the power to impose a privilege tax upon corporations engaged in interstate commerce, for carrying on the part of their business

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which was wholly within the taxing state, where the tax does not affect their interstate business or their right to carry on such business in the state.

In the case of *Postal Telegraph Cable Co.* v. *Charlestown*, 153 U. S. 692, it is held that a city ordinance imposing a license upon a telegraph company, engaged in interstate business, where the same was upon the business done exclusively within the city is not an interference with interstate commerce.

In *New York ex rel. Pennsylvania Railroad Co.* v. *Knight*, 192 U. S. 21, it is held that a railroad company, although principally engaged in interstate commerce, is amenable to a state privilege tax as to such parts of its service as are wholly performed within the state and not as a part of interstate commerce.

In the foregoing cases the acts attempting to impose a tax were specific as to the business to which it should apply, and wherever there was an attempt to levy a tax, either on interstate business or the right to transact such business, the act has been declared unconstitutional as interfering with interstate commerce; and wherever the act has specifically excluded interstate business or has been applicable in terms to local business only it has been upheld, and not to interfere with interstate commerce.

It is urged that the ordinance in question is general and does not limit its application to local or domestic business, and for that reason is made applicable to all of defendant's business and is unconstitutional.

The ordinance by its terms seems to relate to local business only, and we do not believe we should assume that the lawmakers intended to attempt to legislate as to business, persons or territory beyond their jurisdiction. Let us turn our attention to some cases wherein the taxing act has not specifically limited its operation to domestic or interstate business.

In the case of *Ratterman* v. *Western Union Telegraph Co.*, 127 U. S. 411, the state of Ohio attempted to assess a tax on the defendant company upon the receipts of said company within the state, which receipts, it appears, were partly derived from commerce within the state and partly from interstate commerce. The return was made in gross without separation or apportionment. The court held that the tax assessed was not wholly invalid, but was invalid only in proportion to the extent that such receipts were derived from interstate commerce, and restrained the collection of the tax on the interstate commerce; and permitted the collection of that arising upon commerce within its own territory.

In the case of *Osborne* v. *Florida*, 164 U. S. 650, the state of Florida imposed a license or privilege tax upon those engaged in certain businesses and provided that express companies should pay certain amounts, according to the population of the cities in which they did business. It was held that said act affected only domestic business, and so long as a company confined its business solely to interstate or foreign commerce, the law was inapplicable, but that where the company also did a domestic or intra-state business the act applied and did not violate the federal Constitution, and sustained the tax levied on the ground that the state had the right to tax for local business.

This seems to us a much stronger case against the contention of defendant than the case at bar, and if such a general act be permitted to stand, as applicable to a small portion of the business, we do not understand why this ordinance, which is not nearly so general, is not applicable to the domestic business of defendant company.

In the case of *Kehrer* v. *Stewart*, 197 U. S. 60, an act of the state of Georgia provided that there should be assessed and collected "upon all agents of packing houses doing business in this state, two hundred dollars in each county where said business is carried on" Nelson, Morris & Co., of Chicago, were meat packers, and had a place of business in Atlanta where they sold their products at wholesale. They had no slaughter house or packing houses in Georgia, but took orders which were transmitted to and filled at Chicago. The meats were then sent to Atlanta and there distributed in pursuance of said orders. They also shipped meats from Chicago to Atlanta without previous sale or contract, which were kept stored there and held for sale in the ordinary course of domestic business. They were

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offered for sale and kept stored until sold.

Here the tax was not in terms upon the domestic business, nor upon the gross receipts or profits that might be apportioned between interstate and domestic business, but in a gross sum regardless of the fact that the greater portion of the business may have been interstate in character, but the court held that this contingency was met by the case of *Osborne* v. *Florida*, *supra*, and held that the tax was applicable so far as selling to customers in Atlanta was concerned, but not so far as it related to sales made in Chicago in pursuance of which the products were shipped to Georgia.

It seems clear to us that the ordinance in question is applicable to the domestic business of defendant, but no other business of defendant could be included in making up the basis for this taxation.

Defendant alleges not only that the entire ordinance is void as to it, but that in arriving at a basis for the assessment of this tax its interstate commerce was included, and it raises this point in its affidavit of defense. If this be true it is erroneous, but can we correct such an error in these proceedings?

The ordinance provides for a board of appeals wherein any errors of assessment may be corrected, and defendant has had its opportunity to be heard and have its day in court, and having failed to take advantage thereof in the manner prescribed by law, it cannot raise the question here.

In the case of *Hodge* v. *Muscatine, Co., Iowa*, 196, U. S. 276; it is held that, "If the taxpayer be given an opportunity to test the validity of a tax at any time before it is made final, either before a board having *quasi-judicial* character, or a tribunal provided by the state for that purpose, due process is not denied, and if he does not avail himself of the opporunity to present his defense to such board or trbunal, it is not for this court to determine whether such defense is valid."

In the case of the *Western Union Telegraph Co.* v. *Missouri ex rel. Gottlieb*, 190 U. S. 412; it is held that, "Proceedings before a board of equilazation are quasi-judicial, and if an order made by it is within its jurisdiction, it is not void and cannot be resisted in an action at law; nor can over-valuation be made a ground of defense at law. The action of the tax officers being in the nature of a judgment must be yielded to until set aside. And this can only be done in a direct proceeding." To a similar effect are the following: *Moore* v. *Taylor*, 147 Pa. 481; *Stewart* v. *Maple*, 70 Pa. 221; *Carlisle School Dist.* v. *Hepburn*, 79 Pa. 159; *Van Nort's Ap.*, 121 Pa. 118; *Clinton School District's Ap.*, 56 Pa. 315; *Crist et al* v. *Morris*, 2 W. N. C. 620.

It appearing that the city of Titusville had the power, under the ordinance in question, to assess the defendant on the basis of its local business, there was jurisdiction and authority to impose a tax, it being admitted that defendant did some business of this character; and it appearing that a means has been provided for determining the amount of the tax that the same has been determined, the correctness of that determination cannot here be inquired into. It follows, therefore, that no question is here raised that can be questioned and adjudicated in this suit; the rule is made absolute.

For plaintiff, *Geo. Chase.*

For defendant, *Samuel Grumbine.*

From J. D. Roberts, Esq., Meadville, Pa.

Fraud or mistake on the part of an umpire, so great and palpable as to imply bad faith, or his failure fairly and honestly to perform the function assigned to him, is held, in Edwards v. Hartshorn (Kan.) 1 L. R. A. (N. S) 1050, to invalidate his decision.

The right of a bank to apply to the personal obligations of a commission merchant money received for produce sent him for sale and deposited by him in his general account in the bank is denied in Boyle v. Northwestern National Bank (Wis.) 1 L. R. A. (N. S.) 1110.

The failure of the court, in a criminal case, to interpose objections to improper questions made by a juryman is held, in State v. Crawford (Minn.) 1 L. R. A. (N. S.) 839, not necessarily to be reversible error in the absence of objection or exception by counsel.

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PITTSBURGH, PA., SEPTEMBER 12, 1906.

Court of Common Pleas No. 2,

ALLEGHENY COUNTY.

McKEESPORT & YOUGHIOGHENY ICE COMPANY v. JOURNEYMEN HORSESHOERS' UNION.

Equity—Injunction—Jurisdiction—Interference with plaintiff's employe.

On a bill in equity filed to restrain members of a union from endeavoring to induce plaintiff's employe to leave it appeared that no threats or violence had been used, that the employe's services were not more than ordinarily valuable and there was no evidence that plaintiff could not replace him. Held, that it was not a case for equitable relief.

No. 107 October Term, 1905.

Opinion by FRAZER, P. J. Filed April 30, 1906.

The purpose of this bill was to restrain defendants from interfering in any manner with William Hughey, a horseshoer and blacksmith in plaintiff's employ, and from endeavoring to induce Hughey by solicitation, threats or meanaces to refuse to carry out his contract to work for the plaintiff company. From the bill, answer and proofs we find the following facts:

FINDINGS OF FACT.

1. Plaintiff is a corporation created under the laws of this commonwealth for the purpose of manufacturing and supplying ice to the public in the city of McKeesport. The persons named above as defendants are officers and members of Journeymen Horseshoers' Local Union No. 212 of McKeesport, which union is composed of journeymen horseshoers employed in blacksmith shops in the city of McKeesport.

2. In carrying on its business of supplying ice to the public it is necessary for plaintiff to keep, maintain and use a large number of horses and wagons for the purpose of delivering its product to its customers, and for the purpose of keeping such horses properly shod and its wagons in good and safe condition, a large amount of horseshoeing and blacksmith work is necessary. For the purpose of having that work done as expeditiously and conveniently as possible plaintiff has established a shop upon its premises and has employed William Hughey, who is also a member of Journeymen Horseshoers' Local Union No. 212 of McKeesport, as its blacksmith and horseshoer.

3. William Hughey, the blacksmith and horseshoer named in the preceding paragraph, on the 11th day of August, 1904, entered into an agreement in writing with Harry Burkholder, the superintendent of plaintiff company, wherein Hughey agreed to work for plaintiff for the period of five years from that date, as a horseshoer and blacksmith, and in consideration of the services so rendered by him plaintiff covenanted and agreed to pay to him regular union wages, that is, such wages as was paid to other union horseshoers in accordance with the rules of that union, a copy of the agreement herein referred to being attached to plaintiff's bill and marked exhibit A.

4. In accordance with his contract, Hughey continued in the employ of plaintiff until the first day of July, 1905, when he was waited upon by a committee of Journeymen Horseshoers' Local Union No. 212, consisting of John K. Russell and Eugene Irr, who informed him of an agreement entered into the previous night between the members of the Horseshoers Union and the Employers' Association, wherein it was agreed that from and after July 1, 1905, the members of that union should not work in any but regular shops in which union labor is employed, and as a consideration for such agreement upon the part of the horseshoers the employers agreed to grant their employes a half-holiday on each and every Saturday afternoon during the months of July, August and September, without any deduction or abatement on account of their weekly wages. This committee notified Hughey that under the agreement with the

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Employers' Association he should cease working for plaintiff, their reason being that plaintiff's shop was not a shop within the meaning of the agreement with the employers.

5. Upon protesting against the action of the union and declining to quit his employment at once, Hughey was permitted by the committee to continue at work during the remainder of the day. In the early part of the following week defendants named in proceedings induced Hughey to cease working for plaintiff. After an absence of a few days from plaintiff's shop and upon a temporary restraining order being issued by this court restraining defendants from interfering with him, Hughey resumed work and has since that time continued in plaintiff's employment, without interference upon the part of defendants.

6. Previous to the employment of Hughey by plaintiff it had employed in its shop as a horseshoer and blacksmith a person not a member of the Journeymen Horseshoers' Union, and, at the request of that union, plaintiff discharged its non-union employe and engaged Hughey who was recommended to it by the members of the Horseshoers' Local Union No. 212. Since the employment of Hughey under the agreement of August 11, 1904, each party to that contract has complied with its terms; Hughey by rendering satisfactory services to plaintiff, and plaintiff by paying to him even more than regular union wages.

CONCLUSIONS OF LAW.

The bill in this case asks us to enjoin defendants from endeavoring to induce William Hughey, a blacksmith, to leave the employ of plaintiff in violation of his contract. From the facts found above it appears that upon one occasion two of defendants visited the shop of plaintiff where Hughey was at work and informed him of an agreement between the union, of which both Hughey and themselves were members, and the Employers' Association, and requested him, in compliance with that agreement, to cease working in plaintiff's shop. This he at first refused to do, but subsequently yielded to the action of the union and declined to continue further in plaintiff's employ. Later upon a temporary injunction against defendants being issued by this court restraining them from interfering with Hughey "in the performance of his contract by solicitation, threats or menaces," he resumed his position in plaintiff's shop and has continued to work for it until the present time. Neither violence nor disorder upon the part of defendants is alleged nor does it appear that plaintiff would be unable to secure the services of another blacksmith in the event of Hughey's leaving their employ, nor is it alleged that his particular services are more than ordinarily valuable to plaintiff. Under these circumstances the loss of Hughey's services would not result in irreparable injury to plaintiff. Its loss, so far as Hughey is concerned, is covered by the terms of the contract, by his forfeiting three months wages, and if defendants induce him to violate his agreement with plaintiff to its injury its remedy, if it has any, is an action at law for damages. Under these circumstances, we are of opinion equity is without jurisdiction to grant the relief prayed for, and plaintiff's bill must therefore be dismissed.

Let a decree be drawn accordingly.

For plaintiff, *J. S & E. G. Ferguson* and *Calhoun & Johnson.*

For defendants, *Douglass & Fife.*

(Common Pleas No. 2, Allegheny Co.)

McINTYRE v. FERGUSON.

Townships—Supervisors—Election—Act of April 12, 1905.

Under the act of April 12, 1905, providing that at the election in February, 1906, three supervisors should be elected in townships of the second class for one, two and three-year terms except that in townships now having three supervisors the election should take place when the present terms expired, West Deer township having six surpervisors should elect in 1906.

The intention of the act is to have three supervisors in all townships.

No. 275 July Term, 1906. Demurrer to return to alternative writ of mandamus.

Opinion by YOUNG, J. Filed June 4, 1906.

This case comes before us upon demurrer to the return of the defendants to the alternative writ of mandamus. The defendants

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returned that the plaintiff is not entitled to exercise the powers and duties of road supervisor in the township of West Deer in this county, because under the act of April 12, 1905, P. L. 142, the term of office of the plaintiff expired upon the first Monday of March, 1906, and that the defendants are the duly elected and only supervisors of the township of West Deer.

The whole case turns upon the interpretation of the act of April 12, 1905. The first section of that act provides that "in every township of the second class in this commonwealth the qualified voters thereof shall on the third Tuesday of February, 1906, elect one person to serve one year, one person to serve two years, and one person to serve three years, who shall be styled road supervisors; and at each township election thereafter they shall elect one person to serve three years: Provided, that in any township which now has three supervisors or other officers having charge of roads, elected under existing laws, no new election under this section shall be required, except as the terms of said road officers expire."

It is apparent from this section of the act that the intention of the lawmakers was to create a new system for the care of roads of townships of the second class within the commonwealth, under which every such township should have three road supervisors, thus curing the mischief of having the number of road supervisors vary from two to six in the different townships as provided by the various special and local acts which had been enacted after the general act of 1834. This is also made apparent by the 16th section, which repeals all acts or parts of acts, general, special or local, inconsistent with or supplied by the act of April 12, 1905, with the exception of the acts enumerated in that section. This interpretation of the act is not at all inconsistent with the proviso of the first section. That proviso was intended to avoid a useless election in townships having three supervisors or other officers having charge of the roads, because it would be altogether unnecessary and useless in inaugurating the new system to turn out the three incumbents and to elect three others in their places; hence, the provision that no election should be required except as vacancies occurred by the expiration of the terms of those holding the offices, thus keeping the number at three. Any other interpretation of this act would do violence to the clearly expressed intention of the legislative body, and would result in postponing the inauguration of the new system, thus continuing unnecessarily the mischief which the act was intended to remedy.

We are of opinion therefore that an election was required by the act in all townships of the second class except those townships which had three supervisors or other officers having charge of roads, and as the township of West Deer is a township of the second class, and had six supervisors at the time of the passage of the act, it does not fall within the terms of the proviso of the first section of the act of 1905, and that township was required by the act to elect one supervisor for one year, one for two years and one for three years, and having elected the respondents as provided by the act, they are the supervisors of the township, and the plaintiff not having been elected and not being entitled to hold over is not entitled to hold the office of road supervisor of the township.

The demurrer is therefore overruled.

For plaintiff, *John W. Thomas.*

For defendant, *J. S & E. G. Ferguson.*

(Common Pleas No. 2, Allegheny Co.)

BECK v. CAMPBELL.

Landlord and tenant—Holding over—Rent—Reasonable amount.

Where after summary proceedings are commenced to oust a tenant at the expiration of a term the parties agree that tenant may remain until he secures another house the tenant is bound to pay rent for the additional time, and the previous rent will be considered a reasonable one.

No. 1108 October Term, 1905.

Opinion by FRAZER, P. J. Filed May 21, 1906.

Plaintiffs were the owners of a house and lot situate in the borough of McKees Rocks and leased the same to defendants for the period of seven months from September 1, 1904, at a monthly rental of $45, payable on the first day of each and every month in

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advance. The term having expired on the first day of April, 1905, defendants disregarded a notice to quit and continued to occupy the premises, whereupon proceedings were instituted before an alderman of this city by the plaintiffs to obtain possession of the property. A judgment being rendered in favor of plaintiffs, arrangements were made between plaintiffs and defendants by which defendants continued to occupy the premises until April 29, 1905, when they vacated the same. This action was brought to recover the rental for that additional month.

The affidavit sets up two defenses: First, that the proceedings instituted before the alderman to obtain possession were irregular; second, that under the arrangement with plaintiffs by which defendants were to remain in the house until they could procure another place, no rent should be charged. Whether the proceedings before the alderman were regular or not seems to us immaterial so far as these proceedings are concerned. Under the arrangement between the parties defendants were to occupy the house until they could procure another suitable place. This they did, and as there was no understanding that such occupancy was to be free of rent, they ought to pay what the premises were reasonably worth. As they had agreed to pay $45 a month for the preceding seven months, we see no reason why that amount should not be considered a reasonable rental for the additional month.

The rule for judgment is made absolute.

For plaintiff, *White, Childs & Scott.*

For defendant, *T. Mercer Morton.*

Court of Common Pleas No. 1,

ALLEGHENY COUNTY.

BROWN v. NEAL.

Real estate—Sheriff's sale—Rights of tenant—Acts of 1802, 1836 and 1905.

Section 14 of the act of April 20, 1905, P. L. 239, relating to the rights and liabilities of the purchasers of real estate at judicial sales, changes the rule heretofore existing under the acts of 1802 and 1836 in regard to the rights of a tenant for years in case of sale. By the act of 1905 the title of a tenant is paramount to that of the purchaser if the letting to him precedes the entry of the judgment upon which sale is made and also precedes the recording of the mortgage, etc., upon which the purchase by execution is made.

No. 402 September Term, 1905.

Opinion by MACFARLANE, J. Filed February 24, 1906.

OPINION.

By section 14 of the act of April 20, 1905, P. L. 239, "The right of possession of a tenant for years shall be deemed paramount to that of a purchaser at a judicial sale if, and only if, the letting to him shall precede in point of date the entry of the judgment, order or decree on which such sale was had and also shall precede the recording or registering of the mortgage, deed or will, if any, through which by legal proceedings the purchaser derives title."

The language of the act of 1836, Sec. 118, P. L. 780, is, "That he has not come into possession under the title derived to him from the said defendant, before the judgment under which the execution and sale took place."

The act of April 6, 1802, 266, does not contain any provision on the subject, and we understood the decision in *McCall* v. *Lenox*, 9 S. & R. 302, to be based on the principle that a sale cuts up titles acquired subsequently to the judgment.

It was there held that a purchaser of lands sold on a judgment entered on a bond subsequently to the execution of a mortgage to secure its payment shall prevail against a tenant who has obtained his lease between the execution of the mortgage and entry of the judgment. This is also the rule under the act of 1836: *Morris* vs. *Campbell*, 186 Pa. 589.

The language of the act of 1905, is significant of the intention to change the rule. Before "entry" of the judgment is a very different thing from "before the judgment." The date of the judgment itself is the date of the mortgage, while the entry of the judgment is later. We feel constrained to hold that the title of the tenant is paramount, but it is with reluctance, for it appears that the defendant at a time when the bond and mortgage had been in default for almost two

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months leased the premises for two years at a monthly rental, and the tenant, although not required nor privileged to do so by the terms of the lease, paid $900 in advance. This illustrates how easily the rights of a creditor may be lost, unless he issues on his mortgage instead of by the shorter method upon his bond.

The defendant, Neal, is not entitled to a jury trial. He received all of the notice to which he was entitled, and his averment that he had not refused to give up possession is of no importance when coupled with his expression of willingness to assign the lease and the fact that he is not in possession.

We will not at this time make the findings necessary for a final order, as the situation seems to require further proceedings under the act and will give the plaintiff leave to take further steps in accordance with this opinion.

For plaintiff, *Donaldson Bros.*
For defendant, *L. C. Barton.*

Executive Department,

HARRISBURG.

COMMONWEALTH v. SHAFER.

Mandamus—Review of judicial action by mandamus—Petition to Supreme Court.

A petition was presented to the attorney general praying that he permit the filing in the Supreme Court, in the name of the Commonwealth, a petition for a mandamus to be directed to one of the judges of the court of quarter sessions of Allegheny county, commanding him to appoint views under the provisions of the act of May 8, 1876, P. L. 131. The court had considered the matter upon petition and answer filed and in a written opinion had dismissed the petition on the ground that the facts disclosed in the petition did not show a case that authorized the appointment of viewers. Held, that the action of the court could not be reviewed by mandamus. Petition refused.

The attorney general will refuse a petition asking that a petition for a mandamus be filed in the Supreme Court, in the name of the commonwealth, at the relation of the attorney general, when he is convinced that the purpose of the action is to endeavor to compel a judge to act in a manner contrary to his judgment in a matter that had been heard before him.

Upon such a petition the attorney general cannot determine whether an appeal would lie from the decree complained of, or whether an appeal would be an adequate remedy.

Whether a judge has decided correctly is a matter to be determined by proper appellate proceedings, and not by mandamus to compel the judge to alter his decree.

Attorney General's department.

Opinion by CARSON, Attorney General. Filed May 24, 1906.

The record in this case, as exhibited to me, discloses a petition presented under the provisions of the act of May 8, 1876, and its supplements, by twenty or more residents and tax-payers of the county of Allegheny for the freeing of the Sixth street bridge over the Allegheny river from tolls, and praying the appointment of viewers as provided in the act; an answer alleging want of jurisdiction in the court to make the decree prayed for, and a written opinion by the court after a hearing upon petition and answer, resulting in a dismissal of the petition for the reason that the facts disclosed do not show a case which authorizes the appointment of viewers under the act of 1876 or its supplements.

The prayer of the petition addressed to me is that I shall permit the filing of a petition in the Supreme Court in the name of the Commonwealth, at my relation as attorney general, for a writ of mandamus, to be addressed to the Hon. John B. Shafer, the judge who heard and decided the case, "in order that the most adequate and specific remedy may be obtained for the refusal of said court to appoint said viewers, and that the legal question involved in the said proceeding, and raised by the petition and the answer in the respective cases, may be speedily and finally determined." The prayer of the petition for the mandamus, which I am asked to sign, is to the effect that the judge, to whom it is to be addressed, shall be compelled to forthwith appoint the viewers as prayed for in the petition.

It is perfectly clear to me that the application should be refused. It is manifest that the object sought is to compel the judge, who has heard and decided the cause, to act in a manner contrary to his judicial judgment of h e case as it stands upon his record. He

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has decided that the petitioners have not complied with the terms of the act in that they have failed to perform the conditions necessarily precedent to the appointment of the viewers. The petitioners assert that they are not bound by these conditions because the repealing act of 10th of June, 1881 (P. L. 96), has relieved them of that necessity. The court has decided that they are mistaken in their view of the law, and that the act of 1881 does not apply to the facts as found in the case.

It cannot be doubted that this is a judicial judgment, and its exercise involved judicial discretion. It is idle to assert that the appointment of viewers is a purely ministerial act and that this bald assertion gets rid of the vital question that before a purely ministerial duty arises, a judicial duty must be first performed. Before the ministerial duty to appoint arises the judge must be satisfied that he has jurisdiction in the premises, for, if the legal conditions prescribe by the act as necessary to the establishment of the jurisdiction are not met, the appointment of viewers, even if made, would fall to the ground and the whole proceeding would be fruitless of results except annoyance, delay and expense. Before the appointment of viewers can be reached the question of jurisdiction must be determined. The question as to what is essential to the jurisdiction is a judicial question; it is not ministerial. It involves the construction of statutes. This is of the very essence of judicial power, which can mean nothing more nor less than the power which administers justice to the people according to the prescribe forms of law. . . . according to their rights as fixed by law.

I am not concerned with the question as to whether or not the judge decided rightly. That is a question for an appellate court. But I am concerned with the question as to whether or not I shall use the powers of my office to seek to compel a judge to act in a manner contrary to his judgment. This would be intolerable and destructive of the independence of the judiciary. I am not willing to ask the Supreme Court to do that which they have time and time again decided cannot be done; nor am I willing to shirk my own responsibility by an endeavor to impose the burden elsewhere.

As far back as in 1810 Chief Justice Tilghman, in the case of *Commonwealth* v. *Judges of Common Pleas*, 3 Binney, 275, said:

"In the case of the *United States* v. *Lawrence*, 3 Dallas, 42, it was determined by the Supreme Court of the United States, clearly and unanimously, that, although it might command an inferior judge to proceed to judgment, yet they had no power to compel him to decide according to the dictates of any judgment but his own. Upon this principle it would be improper for us to issue a mandamus because the court of common pleas have already decided according to the dictates of their own judgment."

In the case of *Drexel* v. *Man*, 6 Watts & Sergeant, 397, Chief Justice Gibson, in speaking of the remedy by mandamus, said:

"It has never been supposed that it lies to compel performance of a judicial function in a particular way."

It is unnecessary to elaborate. The point is fundamental and cannot be shaken. Nor can a mandamus be used as a substitute for an appeal. In *Johnston's License*, 165 P. S. 324, Mr Justice Williams said:

"This brings us to consider briefly the nature and object of a writ of mandamus. It is a command to some official or other officer to proceed to the discharge of some official duty. When that duty is deliberative or depends upon the exercise of official discretion, the purpose of the writ is to quicken the action of the officer and require him to proceed, to hear, to deliberate, to exercise his discretion. It does not lie to revise the decision of any person clothed with judicial, deliberative or discretionary powers: *Dechert* v. *Commonwealth*, 113 P. S. 229; *Raudenbusch's Petition*, 120, P. S. 328. If a judge declines to hear, or delays a hearing unreasonably, a mandamus is the appropriate remedy. It commands him to proceed to a hearing and decision, but it is not a substitute for an appeal, and it does not bring up for review the soundness of the discretion used or the correctness of the conclusion reached: *Newlin* v. *The County*, 23 Weekly Notes, 152; *Petition of Michael Collarn*, 134 P. S. 551. *Wolff's Petition*, 138 P. S. 316; *Colemans Petition*, 138 P. S. 321."

As recently as 1904 Mr. Chief Justice

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Mitchell, in *Powell's Estate*, 209 P. S. 77, concisely said:

"There is no mandamus to a court what to decide. If a court is evading its duty by refusing or neglecting to proceed, this court may command it to hear and determine the case, but what the decision shall be cannot be commanded beforehand or reviewed afterwards by mandamus."

It is equally futile to urge upon me that it is doubtful whether an appeal would lie, or that it is an inadequate or tedious remedy. That is a question for the appellate court and I have no power to determine it. Chief Justice Tilghman, in the case in 3 Binney, above quoted, discusses the matter as to what constitutes a final judgment to which a writ of error would lie, and Chief Justice Gibson, in *Commonwealth* v. *Mitchell*, 2 Penrose & Watts, 518, says that "An early and salutary doubt seems to have been entertained of the propriety of substituting it for a remedy which merely happens to be more tedious," and he points out that the writ involves an exercise of extraordinary power, which fits it for use only in extraordinary cases where there would otherwise be a failure of justice. "Although demandable of common right, it is truly said to be grantable at discretion; for an indiscriminate use of it would certainly lead to its abolition."

The instances where it may be properly allowed are dwelt upon by Woodward, J., in *Commonwealth* v. *Commissioners of Allegheny County*, 32 P. S. 223, and by Chief Justice Agnew in *Overseers of Porter* v. *Overseers of Jereey Shore*, 82 P. S. 279.

There is nothing which militates against the views above expressed in *Prospect Brewing Company's Petition*, 127 P. S. 525. In that case no issue was joined, and there was nothing on the record which required the exercise of judicial discretion. In the present case there was an answer filed and an issue of law raised, which, after argument, was decided judicially. The cases are dissimilar.

After an extended examination of the authorities, I have found a case which is nearly on all fours with the present one. In *State ex rel Commowealth et al* v. *Lichtenberg, Judge*, 30 Pacific Reporter 1056, the Supreme Court of the state of Washington held that, where there is an action upon an appeal from a judgment of dismissal for want of jurisdiction, the plaintiff's therein are not entitled to have the action of the court reviewed on an application for mandamus to compel the judge to set aside the dismissal and proceed with the trial of the case. It is true that in the case now before me there is no appeal from a judgment of dismissal for want of jurisdiction, the plaintiff's therein are not entitled to have the action of the court reviewed on an application for mandamus to compel the judge to set aside the dismissal and proceed with the trial of the case. It is true that in the case now before us there is no appeal pending, but in the Washington case the appellants offered to waive their appeal in order to prosecute the mandamus, and this waver put the case in precisely the same position as the present one. Mr. Justice Hoyt used language singularly pertinent to the present case. He says:

"It appears from the petition that such action had been dismissed by the court for want of jurisdiction, and that judgment of dismissal had been entered thereon. It further appears therefrom that from such judgment petitioners have prosecuted an appeal to this court and in due form have perfected the same. Petitioners seek by this proceeding (mandamus) to compel the said court to set aside such judgment of dismissal, to reinstate the cause, and proceed to try and determine the same."

I pause in my quotation to point out that this is exactly what is sought by the present proceeding, to compel the court to set aside its judgment of dismissal and to reinstate the cause in such a manner that the viewers may be appointed. Judge Hoyt continues:

"By this proceeding they seek to have this court declare that it is not such a final judgment, without first abandoning the position they have taken, that it is by a final dismissal of their appeal. It is true that they say in the application for the writ that they are willing to waive their appeal. But such offer of waiver in a proceeding in no way connected with the case on appeal, could have no effect thereon. Petitioners cannot place themselves in such an incon-

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sistent position. To allow them to do so would be to give them the benefit of an advance opinion of this court as a foundation for their action as a party to incompleted litigation. If this court should enter upon the main question presented by the petition, the petitioners would be in a situation to take advantage of the decision of the court, whichever way it should decide said question. If the court should hold that the action of the lower court in refusing to take jurisdiction was erroneous, they should get the same benefits as if their appeal had been heard and determined in their favor. On the other hand, if it should be held that the action of the court was proper, it would, in effect decide for the petitioners in this extraordinary proceeding, a case which they have voluntarily elected to bring here in the regular manner by appeal. In our opinion the court cannot consistently aid counsel as to their proper course by entering upon the investigation of the question of jurisdiction decided by the lower court. It follows that the application for the alternative writ of mandamus must be denied."

This case is conclusive of the question. The application is refused.

THE LAW OF AUTOMOBILES. By XENOPHON P. HUDDY of the New York Bar. MATHEW BENDER & Co., Albany, N. Y., publishers, 1906. Price, $3.50.

This is a text book on a subject of growing importance. The right of the owners of motor cars to use the public streets is unquestioned and over thirty-five of the states have recognized this right and regulated it by legislative enactment. The determination of the rights of the owners of motor cars, their use and their duty to the public involves no new principles of law, and this work contains the reported cases of the various states in this country on the subject. Many attempts have been unsuccessfully made to have declared void state enactments on this subject as class legislation. In Pennsylvania the use of motor cars is fully covered by the act of April 19, 1905, which has been in force since January 1, 1906, and is comprehensive of the subject. It provides for the registration of motor cars, their licensing, the speed permitted, the method of proceedure and penalty in case of violation of the speed limit. The work consists of over four hundred pages and includes the various state laws.

NEGLIGENCE. (MANUFACTURER AND VENDOR—MENTAL SUFFERING.) GA.—The liability of the manufacturer of an article for injuries resulting from defects therein receives a novel exposition in Watson v. Augusta Brewing Company, 52 Southeastern Reporter 152, where it is held that a manufacturer who makes and bottles for public consumption a beverage represented to be harmless and refreshing is under a legal duty not to negligently allow a foreign substance which is injurious to the human stomach to be present in a bottle of the beverage, when it is placed on sale, and that one who relying on this obligation without negligence on his own part, swallows several pieces of glass while drinking the beverage from the bottle, may recover from the manufacturer for injuries sustained in consequence. It does not matter, says the court, that the plaintiff did not buy the beverage from the defendant, or that there was no privity of relationship between them. but the duty not to negligently injure is due by the manufacturer not merely to the dealer to whom he sells his product, but to the general public for whom his wares are intended. One element of damages sought to be recovered by the injured person in this case is, however, held to be too remote for consideration by the jury, and while the plaintiff was allowed to recover on accouut of mental suffering caused from the fear of death while the glass was in his stomach, it was declared that a vague fear after the glass had been removed and he had been apparently restored to health, that at some time in the future he might again suffer as a result of his injuries, was not a proper element of damage.—*The Green Bag*,

The power of a state to require the keeper of a bar on a ferryboat making regular trips from another state, where it is owned, to pay a license tax for the privilege of selling liquors while the boat is in the former state, is upheld in Harrell v. Speed (Tenn.) 1 L. R. A. (N. S.) 639.

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PITTSBURGH, PA., SEPTEMBER 19, 1906.

District Court, United States,

WESTERN DISTRICT OF PENN'A.

In the Matter of JOSEPH A. WEST, Bankrupt.

Bankruptcy—Husband and wife—Estate by entireties—Claim of wife.

In 1899 bankrupt and wife took title to real estate in their joint names, the amount paid therefor over and above the mortgage being subsequently furnished by each equally. In 1905 the bankrupt and wife gave a mortgage upon the premises to secure certain indebtedness of the husband, who later became bankrupt. His wife received no part of the proceeds of the mortgage. In a hearing before the referee in the proceedings in bankruptcy the bankrupt's wife claimed the sum of $15,000, the amount of the mortgage, to be allowed her as an unsecured debt against the estate of her husband which was opposed by other creditors. Held, that the estate mortgaged was one of entirety which they jointly pledged to secure the husband's debt, and that until the occurrence of his death before hers no implied assumpsit arose in her favor and that the burden of proving the value of her husband's estate, which was problematical and uncertain, was upon her, which she had failed to do. Claim not allowed.

No. 2984, in bankruptcy.

Report and opinion by WILLIAM R. BLAIR, Referee in Bankruptcy. Filed September 10, 1906.

The claimant in this case is the wife of the bankrupt. She claims the sum of fifteen thousand ($15,000) dollars to be allowed as an unsecured debt against the estate of her husband.

Objections to the allowance of the claim were made by other creditors, and after due notice a hearing was held before the referee, at which the claimant and counsel and counsel for the objecting creditors were present and fully heard.

The facts upon which the claim is founded are undisputed, and are briefly these: In the year 1899, or 1900, the bankrupt, Joseph A. West, and his wife, the claimant, purchased a tract of land in Beaver county on which they have resided ever since. The deed was executed to the bankrupt and the claimant, his wife, by their names, and in form and in fact created in them the estate known in the law as an estate of the entirety. It appears that the price of the land was ten thousand (10,000) dollars; two thousand ($2,000) dollars of which was cash, and eight thousand ($8,000) dollars secured by bond and mortgage on the premises, executed by the bankrupt and the claimant. Of the two thousand ($2,000) dollas cash the bankrupt advanced that entire amount, but subsequently in the course of a year or so the claimant reimbursed him out of moneys received by her from her father's estate to the extent of about one thousand ($1,000) dollars.

In May, 1905, the claimant and the bankrupt together executed a bond and mortgage on the land so held by them to C. C. Law in the sum of fifteen thousand ($15,000) dollars to secure certain indebtedness of the husband, who afterwards became the bankrupt in this case. The petition in bankruptcy against the husband in this case was filed September 19, 1905. The claimant received no part of the proceeds of said mortgage. The claimant has no note or other obligation from the bankrupt, but founds her claim upon the fact of her execution of the bond and mortgage above mentioned to Mr. Law, and the further fact that she received no part of the proceeds of said bond and mortgage.

At the hearing and argument before the referee it was conceded by all the learned counsel present that the estate of the claimant and bankrupt in the land mortgaged to Mr. Law by them was the estate known in the law as an estate of the entirety, and the controversies between counsel turned upon the nature and character of this estate and the results thereof as applicable to the present claim.

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The learned counsel for the objecting creditors contends that each tenant of this estate, during the life of both, holds practically merely a contingent estate in the land dependent upon his or her surviving the other tenant, and that during the life of both the estate of each is intangible, a mere right inseparably interwoven with the estate of the other owner, the value of which is too uncertain and indefinite to form a consideration which can be the basis of an equitable right.

The learned counsel for the claimant on the other hand argues that the claimant was the owner of an estate well recognized by the law as her own, under the acts of assembly of Pennsylvania, securing to her the enjoyment and control of every species of property owned by her; that she received nothing for her mortgage of this estate, but the consideration of the mortgage of her property having been received by her husband will be presumed a loan by her to him under the settled decisions of the court of Pennsylvania; and that at all events, whatever the nature or character of her estate, that it was her signature to the mortgage that made the mortgage valid and operative to produce the money received by her husband, and that it therefore furnishes the consideration upon which equity will raise a promise to repay her.

The first question, therefore, in this controversy is, what is an estate of the entirety? Sir William Blackstone in volume 2, page 182 of his commentaries, after pointing out the properties of joint estates and the unities of interest, title, time and possession necessary to constitute such estates, says, "And therefore if an estate in fee be given to a man and his wife they are neither properly joint tenants, nor tenants in common, for the husband and wife being considered as one person in law, they cannot take the estate by moieties, but both are seized of the entirety *per tout et non per my*; the consequence of which is that neither the husband nor the wife can dispose of any part without the assent of the other, but the whole must remain to the survivor."

That an estate of the entirety is the legal result of a conveyance of land to a man and his wife in Pennsylvania is a settled rule of property established by numerous decisions of the court of Pennsylvania uniformly without exception declaring such to be the law: *Stuckey* v. *Keefer's Executors*, 26 Pa. 397; *Diver* v. *Diver*, 56 Pa. 106; *Gillan* v. *Dixon*, 65 Pa. 395; *Bambery's Estate*, 156 Pa. 628; *Merritt* v. *Whitlock*, 200 Pa. 55. While under the opinion of Chief Justice Mitchell in the last cited case it may be well doubted whether the earlier cases following the strict rule of the old common law that the conveyance to husband and wife was conclusively presumed to vest an estate of the entirety would to-day be followed by the court of Pennsylvania, yet there appears to be no doubt that in this case the bankrupt and his wife, the claimant in this case, have an estate of the entirety.

Now, what is the nature of this estate and its legal aspects as regards the claim in this case? This peculiar estate may not be disposed of by either tenant without the assent of the other, but must remain to the survivor, as stated by Sir William in the quotation above cited, which seems to be followed by all the authorities. The tenants each hold the entire estate during the life of both, but neither holds the estate separate from the other. Their possession is joint, and the possession of the one is so much the possession of the other that the possession of either cannot be held by anyone but the other during their joint lives. In *Diver* v. *Diver* and *Bamberry's Appeal*, *supra*, it was held that neither the married woman's acts of 1848 nor that of 1887 apply to, or affect the nature of the estate of the entirety. Even an attempted involuntary alienation of the estate by the husband by a sheriff's sale thereof during the wife's life passes no title to the sheriff's vendee as against the wife: *McCurdy* v. *Canning*, 64 Pa. 39. In *Leet* v. *Miller*, 6 D. R. Pa. 725, a husband and wife being tenants of the entirety of real estate together mortgaged the land, and on this mortgage the land was sold at sheriff's sale for a sum exceeding the amount of the mortgage. The balance in the sheriff's hands after payment of the mortgage was was claimed by certain judgment creditors of the husband, who also prayed that in case the balance was not awarded to them on their judgment the court should require the

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husband and wife to enter security for the fund to protect the judgment creditors of the husband in case he survive his wife, or else that the fund should be invested during the joint lives of husband and wife; the interest to be paid in the meantime to them. The court, however, awarded the entire balance in the sheriff's hands to the husband and wife without restriction. Thus we see the tenants each have the entire estate during the life of both, but neither holds the estate separate from the other. The possession of one is so much the possession of the other that the possession of either cannot be held by any one but the other during their joint life. Neither of the tenants can dispose of or transfer his or her interest without the concurrence of the other tenant. It is equally well established, however, that an estate of the entirety may be alienated by the concurrence of both tenants as was done in this case, and then the question arises as to the interest or right of each to the proceeds of such alienation. Are both entitled to the whole, and therefore each to the half, or is each entitled to the whole, though jointly with the other during the lives of both so that the whole on the death of one becomes absolutely the property of the other?

In *Bamberry's Appeal*, 156 Pa. 628, land was conveyed to husband and wife; the wife paying one-half of the purchase money out of her separate estate, the husband paying the other half. They held the land for twenty-five years and then sold it, and took from their vendee his bond and mortgage to them to secure to them the balance of the purchase money unpaid. Ten days after the sale was consummated by conveyance the wife died. It was held that the husband was entitled to the whole mortgage.

In *Parry's Estate*, 188 Pa. 33, a letter of credit purchased by the husband with his own money exclusively made payable to himself and wife, and intended to be used in a journey abroad, creates an estate of the entirety, and if the husband dies before the letter of credit is exhausted, the wife is entitled by survivorship to any balance that may be due upon it.

In each of these cases the court said that the property was held as an estate of the entirety, and there being nothing in the cases respectively to rebut the presumption arising from the form in which the property was held. It is true that in these cases the opinions seem to indicate that when the estate is in personal property, though held as an estate of the entirety, it, the personal property, may be divided by the tenants as they see fit. This was, of course, an impossibility in the case of an estate of the entirety in real estate, because it never was a joint estate to be divided as its somewhat peculiar name shows, and was intended to show; it was an estate of the entirety; the only thing joint about it was the possession.

It is difficult to see logically how an estate of the entirety can be divided, as each is entitled to the whole, though the convenience of such rule allowing the division is, of course, obvious. However, assuming that an estate of the entirety of personal property and the proceeds of an estate of the entirety of real estate may be divided by the owners as they see fit, is the claimant here entitled to have her claim allowed? The facts in the case, it will be remembered, are briefly that she signed the mortgage of the estate of the entirety with her husband to secure the payment of her husband's debts, and that is all. Now, what are the inferences to be drawn from this transaction, remembering that the estate mortgaged was an estate of the entirety, his precisely the same as it was hers? There is no evidence of a division of the proceeds between that and a loan of her share thus divided to him. She claims the whole amount of the mortgage, but the land was his as much as it was hers. He had the same right to the proceeds as she, and she had no more right than he. Are we to assume that he first gave her his $15,000, and she then loaned to him the same sum? There is no evidence to justify this, and even if there were, it is undisputed that at the time of the mortgage he was utterly insolvent, and as against his creditors such a juggery could not be upheld. On the other hand, the true solution of the rights of these parties growing out of this transaction is this: that they together pledged an estate to secure his debt; that until her property pays, or secures this debt, no implied assumpsit arises in her favor, and that whether her property pays or secures his

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debt is uncertain until, and contingent upon, his death before hers, and that therefore until the occurrence of his death before hers no implied assumpsit arises in her favor. While they both live the value of the estate of each is wholly problematical and incapable of ascertainment; but the burden is on the claimant to prove her claim in dollars and cents, and the referee is of opinion that this she has failed to do.

But the claimant's counsel urgently urges that she signed the mortgage, and her signature produced the money, and therefore be her estate what you will in value, her signature is a valuable consideration to support an assumpsit and her claim here. But the answer to this, it seems to the referee, is plain. Equity will give her what she gave, but the burden is on her to show with reasonable certainty how much she is entitled to. To sustain an implied assumpsit the value must always be shown; otherwise, the the damage is nominal, and applying this rule to this case, if the claimant dies first she has no estate mortgaged. The property then is the bankrupt's alone, and yet if her claim be now allowed she may be paid ten-twenty per cent or in full the amount of a mortgage which was not on her property, but on his, and his other creditors would practically pay the mortgage twice, once to her who has as yet an estate of value in the land only contingent on her surviving her husband, and again to the mortgagee. It is true her signature to the mortgage created a possibility, or we may even say, probability, of her having to pay the amount of the mortgage out of her real estate; but that possibility or probability is, in the judgment of the referee, too uncertain and contingent to form the basis of a decree. It is perhaps true, as counsel argue, that to refuse her claim is to practically transfer to the bankrupt her estate, but it is equally true that to allow it is, in the same sense, practically to transfer his estate to her, and it must not be forgotten that the land mortgaged was his as much as it was hers.

The referee is of opinion that this claim cannot be allowed.

Court of Common Pleas No. 2,

ALLEGHENY COUNTY.

COMMONWEALTH ex rel, KIRSCHLER v. BROWN.

Municipalities — Powers — Charity—Relief of people of another city.

The city of Allegheny has no authority to appropriate money for the relief of the suffering in San Francisco due to the recent earthquake.

No. 290 July Term, 1906. Sur demurrer to return to writ of alternative mandamus.

Opinion by SHAFER, J. Filed May 12, 1906.

The petition is by the mayor of the city of Allegheny alleging that on April 18, 1906, the city of San Francisco was greatly injured by earthquake and fire; that on April 19th a resolution was entered in the common council of the city of Allegheny and adopted unanimously by the members who were present, and was messaged to select council and adopted unanimously by the members of select council who were present on April 20th, and was approved by the mayor on April 21st, to the effect that the city controller should issue a warrant for $2,500 in favor of the mayor of the city of Allegheny, who was to forward the same to the mayor of the city of San Francisco for the benefit of the sufferers from the earthquake and fire; and that the people of the city of San Francisco are large consumers of the manufactured products made by the citizens of the city of Allegheny; and that there is a large trade and commerce between the inhabitants of said cities; and that the controller has refused to issue a warrant in accordance with the ordinance or resolution, alleging that the same was contrary to the provisions of the constitution. The issue of a writ was waived by the controller, and he made a return in which he neither admits nor denies the alleged relations between the cities, admits the passage of the resolution, but declares that the same is opposed to the provisions of the constitution of Pennsylvania, article 9, section 7, and further that the resoultion was passed by councils in violation of the provisions of article 14, section 4 of the act of March 7, 1901, P. L. 20, which

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prohibits the final passage of a resolution or ordinance on the same day it is presented, except in cases of public emergency, and only when requested by the city recorder (mayor) and approved by the affirmative votes of all the members of council. To this return the relator demurred.

As to the power of a city to make such an appropriation, we are referred to the case of *Commonwealth* v. *Pittsburgh*, 183 Pa. 202, where it was held that the city might appropriate money to defray the expenses of surveys for a ship canal from the city of Pittsburgh. We are of opinion, however, that the cases are not analogous, and that the appropriation of money by the city to examine into the feasibility of a proposed highway to be made to and into the city is far different from an appropriation to relieve the present distress of individual citizens of a distant city. It seems to us that if the city of Allegheny may appropriate money to the relief of citizens of San Francisco, who have been injured by earthquake or fire, much more would it be justified in making similar appropriations to its own citizens who may suffer by fire or other calamities, and this, certainly, no one would claim to be within the power of the city.

We deem it unnecessary to discuss the questions raised by the passage of the resolution on the same day in which it was introduced, without, so far as appears, a request by the city recorder, or mayor, and without a vote of all the members elected to the council.

The demurrer is overruled and it is ordered that judgment be entered for the defendant with costs.

For plaintiff, *Elliott Rodgers.*
For defendant, *Craig Smith.*

A provision of a State insolvent law, making the costs incurred in an attachment suit a preferred claim if the claim upon which the suit was commenced is proved against the estate of the debtor, has been held in In re The Copper King, Limited, 16 Am. B. R. 148, to be in conflict with and therefore suspended by section 67f of the Bankrupt Act, 1898, where the attachment is obtained within the four months period.

PROPERTY. (Oil and Gas Leases—Implied Covenants.) U. S. C. A. 8th Circuit.

A number of points of considerable importance are contained in Brewster v. Lanyon Zinc Company, 140 Federal Reporter, 801. An oil and gas lease on three separate tracks of land gave the lessee two years within which to drill a well on said premises, and provided that the time might be enlarged by the payment of an annual rental from the expiration of the second year until the well was drilled, and that if no well should be drilled upon the premises within five years, the lease should be void. In construing this lease the court holds that the measure of diligence which the lessee was required to exercise in prosecuting the work of exploration and development during the first five years was expressly defined, and not left to the implication which otherwise might have arisen from the nature of the lease, and the other stipulations therein, and that a well having been drilled on one of the tracks during the fifth year, and the stipulated rental having been paid from the end of the second year until that well was drilled, the lease was not avoidable merely because other wells were not drilled during the five year period. Further provisions of the lease granted all the oil and gas under the lands, together with the right to enter at all times for the purpose of drilling and operating, to erect and maintain structures, pipe lines, and machinery necessary for the production and transportion of oil and gas, and touse sufficient water, oil and gas to run the necessary engines for the prosecution of the business. Substantial royalties in kind and in money were reserved to the lessor in proportion to the oil produced and saved and the gas used off the premises, and it was apparent from the terms of the lease that the promise of these royalties was the controlling inducement to the grant. As previously mentioned, the lease while requiring the drilling of one well during the first five years did not expressly define the measure of diligence to be exercised in the work of development and production after the expiration of that period. The provisions construed together are regarded as amounting to a covenant by the lessee, that

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if during the five years allowed for original exploration and development either oil or gas were found in paying quantities, the work of development and production should be continued with reasonable diligence, that is, along such lines as would be reasonably calculated to make the extraction of oil and gas from the leased land of mutual advantage and profit to the lessor and lessee. Consequently on failure of the lessee to take any steps to develop the land after its value had become apparent from the drilling of an experimental well, it is held that the lessor was entitled under this implied covenant to enforce a forfeiture by suit in equity and this despite the fact that equity will not ordinarily grant relief by the enforcement of a forfeiture.—*The Green Bag.*

The constitutionality of a statute making the possession of liquor prima facie evidence of intent to violate the statute against illegal sales is upheld in State v. Barrett (N. C.) 1 L. R. A. (N. S.) 626.

The power of the legislature to authorize the institution of prosecutions for common-law felonies by information without indictment is upheld in State v. Stimpson (Vt.) 1 L. R. A. (N. S.) 1153.

A stipulation that a suit for breach of a contract to transmit a telegram must be brought within sixty days is held, in Western U. Teleg. Co. v. Greer (Tenn.) 1 L. R. A. (N. S.) 525, to be binding on a minor.

Mere violation of a statute making it a a misdemeanor to hunt on another's property without a permit is held, in State v. Horton (N. C.) 1 L. R. A. (N. S.) 991, not to be such an unlawful act as to render an accidental homicide committed while so doing a criminal offense.

That illegitimate children were the result of adulterous intercourse is held, in Miller v. Pennington (Ill.) 1 L. R. A. (N. S.) 773, not to prevent the subsequent intermarriage of their parents, and their acknowledgment by their father, from effecting their legitimation under the Illinois statute.

MASTER AND SERVANT. (PERSONAL INJURIES—SAFE PLACE TO WORK.) N. Y. SUP. CT., APZ. DIV. 2D DEPT.

A peculiar case in which liability for personal injuries was sought to be predicated upon the ground that the relation of master and servant existed, is that of Walker vs. Gleason, 96 New York supplement, 843. The plaintiff in that case rented four rooms over which defendant who was the landlord retained no control. By the same contract apparently by which the premises were leased plaintiff was employed to keep the hall lamps in the building in order and was allowed a certain sum per month for perforing these services. Plaintiff took the lamps into one one of her own rooms for the purpose of cleaning and filling them, and while engaged in this work a portion of the ceiling fell and injured her. She sought to hold the landlord responsible for these injuries on the ground that as her employer he had failed to furnish her a safe place to work. Recovery is denied on the ground that the landlord did not furnish plaintiff's rooms as a place to work in, but that she rented the rooms on her own account and while occupying them even for the purpose of performing service for the landlord, her status was that of a tenant.—*The Green Bag.*

In In re Berkowitz, 16 Am. B. R. 251, it has been held that where a referee in bankruptcy, after full hearing, decides that certain personal property is no part of the bankrupt's estate, but belongs to his wife, he may not retrain by injunction the seizure of the property under a writ of replevin issued in an action by the trustee to recover possession.

It has been held in In re Castleberry, 16, Am. B. R. 159, that the only jurisdiction that a court of bankruptcy has ever exempt property, is to set aside, but when the exemption claimed is in money held by the trustee, the court will hold the fund until proper proceedings can be instituted and the money sequestered by a court of competent jurisdiction for the benefit of parties in interest and in the meantime will refuse the bankrupt his discharge.

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PITTSBURGH, PA., SEPTEMBER 26, 1906.

Court of Common Pleas No. 2,

ALLEGHENY COUNTY.

CONNELL v. McWATTERS et al.

Contract—Financing a new corporation—Compensation—Failure to raise required funds.

Where a verbal agreement provides that plaintiff should raise funds to finance a corporation for the purpose of installing certain patents in a gas works and receive certain stock for his services, the plaintiff is not entitled to the stock if he fails to raise the necessary funds, although he has employed his time and work on the matter.

No. 1059 January Term, 1906. In equity.

Opinion by FRAZER, P. J. Filed April 30, 1906.

The purpose of this bill was to compel defendants to assign to plaintiffs an undivided one-third interest in an invention for the manufacture of gas, together with one-third interest in the capital stock of the McWatters Bi-Product and Gas Manufacturing Company, which company was formed for the purpose of marketing the invention. From the bill, answer and proofs we find the following facts and conclusions of law:

FINDINGS OF FACT.

1. Defendant, Thomas McWatters, being the inventor of a process for manufacturing gas and bi-products, was desirous of having the same protected by letters patent and to that end agreed with defendants, Alexander McKim and Andrew H. McKim, to assign interests therein to them upon letters patent being issued, the McKims to pay all costs and expense necessary in obtaining such letters patent in consideration for the interests assigned to them, these interests were two-ninths to Alexander McKim and two-ninths to Andrew H. McKim, the remaining five-ninths interest continuing in Thomas McWatters.

2. The owners of the patent being desirous of placing their invention upon the market, and unable to do so because of want of necessary funds and lack of acquaintance with persons having money to invest, became acquainted with plaintiff and entered into a verbal agreement with him by which he agreed to "finance" a corporation to be created for the purpose of putting the McWatters invention upon the market. In consideration of his services plaintiff was to receive full paid stock of the corporation to the amount of $50,000. That at the time of entering into the agreement just referred to, plaintiff informed defendants he had on at least two previous occasions "financed" corporations organized for manufacturing and supplying gas, and that he could secure the necessary funds to test the McWatters invention. A corporation was formed by McWatters and the McKims under the name of the McWatters Bi-Product & Gas Manufacturing Company with a capital stock of $500,000, divided into shares of the par value of $50 each.

3. Subsequent to the agreement between plaintiff and defendants, plaintiff endeavored to purchase the plant of the Irwin Manor Fuel, Gas & Light Company at Irwin, Pa., and afterwards made efforts to obtain a gas works at Beaver Falls, Pa., it being the intention of the company to install the McWatters patent at these places. These efforts were unsuccessful because of plaintiff's failure to secure the funds necessary to rebuild, readjust and make suitable the works for installing and using the McWatters invention.

4. Subsequent to the failure at Irwin and Beaver Falls, plaintiff visited Wooster, Ohio, and arranged with the stockholders of the Wooster Gas & Light Company whereby the McWatters Bi-Product & Gas Manufacturing Company was to become the owner of the Wooster Gas & Light Company's plant. In consideration for such purchase the stockholders of the Wooster company agreed to exchange their stock for shares in the McWatters company, share for share, upon plaintiff promising to procure the funds necessary to re-construct the Wooster works so that gas could be manufactured by the

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McWatters invention and supplied to consumers in that city. Plaintiff, however, failed to raise the $25,000 estimated to be necessary for that purpose and upon such failure the shares of stock received from the stockholders of the Wooster company were re-assigned to them, and the stock of the McWatters company received by the shareholders of the Wooster company re-assigned to that company and the agreement terminated.

5. Since the failure of plaintiff to raise funds necessary to rebuild and equip the the Wooster plant with the McWatters patent, defendants, on their own account, have been negotiating with the stockholders of the Wooster Gas Light Company, and have about concluded arrangements by which the McWatters company will install the McWatters invention at the works of the Wooster company. Plaintiff, however, took no part in those negotiations, and was not in any manner instrumental in concluding the agreement between the parties.

6. Plaintiff's contention is that he was to receive a one-third interest in the invention of McWatters and also one-third of the capital stock of any corporation created for the purpose of putting the invention upon the market. In accordance with that claim he now seeks by this bill to require defendants to assign to him one-third of the entire $500,000 capital stock of the McWatters Bi-Product & Gas Manufacturing Company. This stock he claims to be due him under his agreement with defendants and in consideration of the services rendered by him to them under his verbal agreement with them. Defendants' contention is that plaintiff agreed to secure a plant and raise the money necessary to install and put into operation the McWatters invention, and in consideration for so doing was to receive $50,000 of the stock of a corporation to be created, and that having failed to carry out his agreement and secure funds necessary to install the McWatters invention, he is therefore not entitled to any portion of the stock of the McWatters company.

CONCLUSIONS OF LAW.

This case turns upon the terms of the verbal agreement made between the parties in the fall of 1904. If plaintiff's contention is correct, he would be entitled to have assigned to him at least 1,000 shares of the capital stock of the cerporation formed to put the McWatters invention upon the market. If defendants' contention is correct, then the plaintiff is not entitled to any portion of the stock and his bill should be dismissed. It seems to us the weight of the testimony is in defendants' favor as to the understanding beswen the parties as to plaintiff's undertakings and the amount of stock to be received by him. Defendants were workingmen without capital or business experience; they needed both to make their invention profitable, and plaintiff represented to them that he had on previous occasions raised sufficient funds to construct and equip two gas plants and with his knowledge of the business could secure a property and furnish the money necessary to install the McWatters invention in it. That such was plaintiff's undertaking was testified to by defendants, and while plaintiff contradicted them in his testimony and testified that he was "simply to use his best endeavors to advance the interests of the McWatters company," the defendants' contention is corroborated to a certain extent by Mr. Hope, a witness for plaintiff, who testified that "plaintiff was to finance the company" and also by the witnesses from Wooster, who all testified that plaintiff informed them he was to furnish the money and would furnish it within forty-eight hours, as he had already made "arrangements to capitalize the company." Plaintiff did not either secure a plant or raise a dollar of money for the purpose of exploiting the McWatters invention. Every effort made by him was unsuccessful because of his failure to raise funds. Of course if the agreement was as plaintiff testifies, it would make no difference whether he was successful or unsuccessful--he would be entitled to his stock, provided he used "his best endeavors to advance the interests of the company." The evidence, however, does not establish that claim, and it seems unreasonable that defendants would agree transfer to anyone an interest in an invention they believed to be valuable without assurance of receiving some benefit in return.

2. Plaintiff's claim that defendants have

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not allowed him a reasonable time to secure a plant and "finance" the company is not established. He has had since the fall of 1904 to perform his undertaking, and has accomplished nothing, and even now does not allege an ability upon his part to carry out his agreement. Certainly, defendants are not obliged to hold their invention idle indefinitely in the hope that plaintiff may some day find a man willing to invest his money in a works to test it.

3. Considering all the testimony, we are of opinion that plaintiff, under his agreement with defendants, was not to receive an interest in the McWatters invention, but was to receive $50,000 of the capital stock of a corporation to be formed to market the invention provided he procured a gas works in which the invention could be installed and raised the money necessary to pay for both the works and the cost of installation. Having failed to carry out his undertaking, he is not entitled to the stock and his bill must therefore be dismissed.

Let a decree be drawn accordingly.

For plaintiff, *Jennings & Jennings.*

For defendants, *Samuel J. McKim.*

Court of Common Pleas,

CLEARFIELD COUNTY.

COMMONWEALTH v. SHAFER.

Constitutional law—Boroughs—Criminal law—Health law—Plumbing—Delegation of legislative power—Act of June 24, 1895, P. L. 232.

The act of June 24, 1895, P. L. 232, relating to the registration of plumbers involves a wronful delegation of legislative power to cities and boroughs and is therefore unconstitutional.

Nos. 57. and 58, May Sess., 1906. Offense charged: Violation of rules and regulations of health board of DuBois borough and plumbing without license. Sur motion for discharge of defendant.

Opinion by SMITH, P. J. Filed July 14, 1906.

The cases came before the court for trial at May Sessions, 1906, whereupon counsel for defendant moved for the discharge of the said defendant "for the reason that the acts charged in the information made do not charge any indictable offense.

"First. The defendant avers there is no authority of law vested in the board of health of the borough of DuBois authorizing it to make and promulgate the rule set forth in the information. Second. That there is no valid act of assembly authorizing the said board to make such rule and regulations. Third. That the rules quoted as aforesaid are unreasonable and an unlawful interference with the constitutional right of the defendant to pursue his employment."

While there are two cases the offenses charged in them are practically the same. The informations are made by W. J. Smathers, health officer of the borough of DuBois, and allege in one that on March 26, 1906, and in the other April 6, 1906, and prior to said date, the said defendant started as a master plumber and did plumb in a building of one J. Reilly at 525 First street, in said borough of DuBois, without having taken out a plumber's license or having the right to do plumbing, contrary to the act of assembly in such case made and provided and the rules of the board of health of the borough of DuBois promulgated, which rules are as follows: "Every person engaged in the plumbing business in the borough of DuBois as a master plumber, and every person coming from others place for the purpose of doing plumbing work in the borough of DuBois as a master plumber, shall appear in person at the office of the board of health and register his name and business address upon blanks prescribed by the board of health and receive a certificate of registry upon presenting satisfactory proof that he is a bona fide master plumber, and no person other than a registered plumber shall be allowed to carry on or engage in the plumbing business or to make any connections with any sewer, drain, soil, or waste pipes connected therewith, and all persons failing to furnish the board of health with satisfactory proof as called for above shall be obliged to pass an examination before the examining committee of the board of health of the borough of DuBois."

The prosecution in this case bases its right to prosecute the defendant upon an act of assembly approved June 24, 1895, P. L.

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232, which provides as follows: Section 1. Be it enacted, etc, that from and after the passage of this act the boards of health in cities and boroughs of this commonwealth shall be and they are hereby authorized and directed to adopt and promulgate suitable rules and regulations for the construction of house drainage and cesspools, and to provide for the registration of journeymen and masters plumbers and persons engaged in plumbing business in cities and boroughs: provided, that the provisions of this act shall not apply to boroughs having no system of water supply or system of sewerage. Section 2. Any person who shall refuse or neglect to comply with the requirements of said rules and regulations when promulgated shall be guilty of a misdemeanor; and on conviction be sentenced to pay a fine of not more than $100, or undergo an imprisonment not exceeding one year, or both, in the discretion of the court: provided, that the provisions of this act shall not be construed to repeal the provisions of an act entitled 'An act authorizing the boards of health in cities of the first class to regulate house drainage, the registration of master plumbers and the construction of cesspools,' approved the 30th day of June, Anno Domini, one thousand eight hundred and eighty-five."

The act of 1895 is practically a re-enactment and attempt to make general throughout the cities and boroughs of the commonwealth the act of June 30, 1885, P. L. 250, excepted by the proviso of this act, with the exception of Sec. 2 of the act of 1885, which established a system of inspection which is not included in the act of 1895.

Counsel for the commonwealth in the caes in hand relies upon the authority of *Com.* v. *Lambrecht*, 3 C. C., Rep. 323, construing the act of 1885 as constitutional. Neither the act of 1885 nor the act of 1895, in question, seems to have been passed upon by the Appellate courts and no other lower court decisions are brought to the attention of the court construing either of said acts. The constitutionality of the act of 1895, here involved, is attacked by counsel for defendant, first, because of the proviso of Sec. 1 making it not to apply to boroughs having no system of water supply or system of sewerage; and second, in that it delegates authority and grants to certain boards of health the power to promulgate rules and regulations the enforcement and the violations of which when so promulgated are made indictable by the act. It is not necessary for us to pass upon the first reason given for the unconstitutionality of this act, because to our mind the second is a more obvious objection to the validity of the act.

What are the offenses charged in these two informations and on what are they grounded? It seems that the board of health of the borough of DuBois, under and by virtue of the act of 1895, supra, adopted certain rules and regulations on May 22, 1896, followed by an ordinance of the council of the borough of DuBois under date of August 11, 1896, and approved by the burgess on August 13, 1896, adopting and approving the said rules and regulations. Among said rules and regulations is that one requiring a person engaged in the plumbing business to register as such upon satisfactory proof that he is a bona fide master plumber, or in case of failure to furnish such satifactory proof to pass an examination before an examining board, as set forth in the full text of the said rule in the information above given. The charge then is that he did plumbing without registering as required by said rule of the board of health, duly approved by the ordinance aforesaid. The rule promulgated by the board of health, requiring the registration, seems to be within the contemplation of the act of assembly, though that portion of the rule requiring an examination is not authorized specifically in the act. Conceding, however, for the purposes of this case, that the rule in question promulgated by the board of health of the borough of DuBois comes squarely within the terms of the act of 1895, is the said act constitutional in that it has designated to the board of health of the borough of DuBois and the town council of the borough of DuBois the right to legislate and make a criminal offense out of which would otherwise be an innocent exercise of the citizen's right of occupation? We think it is clearly a delegation of legislative power and, therefore, unconstitutional.

This case comes within the ruling of *O'Neil* v. *The Fire Insurance Co.*, 166 Pa. 72.

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As is there so well said by Mr. Justice William, "The elementary books divide a statute into three parts, the declaratory, the directory and the vindicatory. In this statute the legislature furnished the first and third. It delegated the preparation of the second. It declared in effect the need of a standard form of policy. It provided punishment for the failure to use such form when provided; but it turned the preparation of the form over to its appointee and gave him six moths in which to do his work and file a copy of it in his own office. Whoever might be interested in knowing the directory part of the statute and understanding what it was he was required to do, had to go beyond the act of assembly and inquire of the appointee of the Legislature what it was he had filed in his own office of which the people of the commonwealth were bound to take notice at their peril." In that case, which was a civil action, a standard form of policy of fire insurance was involved and the act authorizing the insurance commissioner of the state of Pennsylvania to prepare, adopt and promulgate a standard form of policy was declared unconstitutional and void. In this act the legislature authorizes and directs boards of health to adopt and promulgate suitable rules and regulations for the construction of house drainage and cesspools, and also to provide for the registration of journeymen and master plumbers engaged in plumbing business in cities and borough, but does not in any way prescribe what those rules and regulations shall be nor what shall be required of applicants for registration as journeymen or master plumbers. It leaves and delegates all such rules and regulations and all such requirements of registration to the legislative acts of the boards of health. The rules and regulations or the requirements for registration may be as various as the cities or boroughs which adopt them. It follows, therefore, that what would be a misdemeanor, indictable as such, in one borough or city, may be perfectly innocent in another or even in all others.

The act itself is not of such clear, certain, uniform and universal application as should be required of all statutes which attempt to punish by indictment in a court of quarter sessions by a heavy fine and imprisonment. For this reason it is violative of the whole tenor of the criminal law. *Com.* v. *Standard Oil Co.*, 101 Pa. 119-150. This delegation of power to create an offense under the law is apparent from the information itself. To make out and constitute an offense the rule of the board of health alleged to have been violated had to be quoted. This rule lays down the requirements and designates who shall and who shall not be registered. Moreover, it clearly goes outside of any legislative authority when it re-delegates to a board of examiners the right and power to exclude by examination. Nowhere in the act, upon which the said rules and regulations were promulgated, is there given any authority of examination. Clearly, therefore, this act of 1895 is a delegation of legislative power to boards of health, in that all of the directory part of the statute is omitted and an outside municipal body is authorized to promulgate such directory parts of the statute. It is even more offensive in this regard than the statute passed upon in O'Neil v. The Insurance Company, and we could well paraphrase many of the reasons given therein to show that it is a delegation of legislative power. It is moreover more offensive than said act, for the reason that violations of the said delegated legislative enactments is attempted to be punished by indictment in the quarter sessions, with a year's imprisonment as the maximum penalty. While it is true that Judge Arnold, in *Com.* v. *Lambrecht*, *supra*, sustained the constitutionality of the act of June 30, 1885, containing similar provisions, yet his opinion on this portion of the act does not seem to have been very thoroughly considered as to its general effect, and moreover that opinion was prior to the opinion in O'Neil v. The Insurance Company, since which it seems to us that no such delegation of power would be recognized by any authority.

Moreover, it seems to us that the legislature has since the passage of said act recognized the futility of that legislation. The act of June 7, 1901, P. L. 493, legislates specifically as to all of the requirements, rules and regulations for plumbing and for registration of plumbers in cities of the second class. So also the act of May 16. 1901, P. L. 224, as to cities of the third

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class, legislates as to registration of plumbers. Both of these acts specially provide for examination, as well as registration, and and both of them contain penal clauses punishing violations thereof and in neither of them is such punishment by indictment nor do they involve imprisonment. We have, therefore, an anomaly, that in cities of the first class and in such boroughs and cities under the third class as may adopt rules and regulations under the act of 1895, violations of the rules and regulations respecting plumbers shall be punished by indictment in the quarter sessions involving a possible imprisonment, while in cities of the second and third classes under subsequent legislation there is defined just what is required in order to register as journeymen or plumbers and violations of such requirements are punished by a fine imposed by magistrates or aldermen in summary proceedings.

Some corrective legislation seems to be needed. We believe fully in the wisdom and propriety of laws controlling and regulating sanitary plumbing and do not want to be considered as throwing anything in the way of the proper regulation of such subject matters in the boroughs of our own county. But we are clearly of the opinion that there is no statutory offense charged in the informations in the cases which we are considering, for the reason that the acts of assembly attempting to create the offenses therein charged are unconstitutional in that they delegate the power to define the offense to a body other than the legislature itself.

Now, July 14, 1906, the rule granted by the court on May 21, 1906, to show cause why the defendant should not be discharged is hereby made absolute and the defendant is discharged.

For commonwealth, *W. I. Swope, W. C. Pentz.*

For defendant, *Bell & Hartswic.*

From Oscar Mitchell, Esq., Clearfield, Pa.

The power of a court of equity to prevent majority stockholders from exercising their statutory power to reduce the capital stock in order to relieve defaulting stockholders from meeting their obligations is asserted in Theis v. Durr (Wis.) 1 L. R. A. (N. S.) 571.

A Digest of the Bankruptcy Decisions Under the National Bankruptcy Act of 1898. Reported in the American Bankruptcy Reports, volumes 1 to 14 inclusive (1898-1906.) By Melvin T. Bender and Harold J. Hinman of the Albany, N. Y. Bar. Mathew Bender & Company, Albany, N. Y., publishers. Price, $5.00.

The examination of the separate indexes of all the volumes of any series of reports is exceedingly cumbersome and has caused no little inconvenience in the use of the American Bankruptcy Reports. The busy lawyer will therefore find it desirable to have a complete index to all the decisions and notes contained in one comprehensive digest. In fact the continuous demand made to the publishers of these reports for such a digest has led to the preparation of this volume. The work involved in its preparation has been one of considerable magnitude, and has been done with the greatest possible care. While it cannot be hoped that no defect will be found therein, it is confidently believed that its use will prove very satisfactory and valuable.

Attention is called to the table of sections of the Bankruptcy Act of 1898, construed in or considered in or affected by the decisions reported in volumes 1 to 14 of the American Bankruptcy Reports. This table takes the Bankruptcy Act by sections, giving all decisions construing each section.

The work is well edited, and fills a decided want in the legal profession.

It has been held by the Circuit Court of Appeals, Fifth Circuit, in Samuel v. Dodd, 16 Am. B. R. 163, that an order requiring a bankrupt to surrender assets in his possession and forming part of his estate is not an order for the payment of a debt, and his commitment upon refusing compliance therewith is not imprisonment for debt.

The District Court, Western District of New York, has held in Parker v. Black, 16 Am. B. R. 202, that a trustee in bankruptcy may maintain a suit in equity to recover a voidable preference, and that a payment within the four months period by an insolvent debtor to a creditor having reasonable cause to believe that it was intended thereby to give him a preference may be recovered by the trustee irrespective of the intent of the bankrupt in making the payment.

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PITTSBURGH, PA., OCTOBER 3, 1906.

Court of Common Pleas No. 2,

ALLEGHENY COUNTY.

BORO OF CRAFTON v. COUNTY OF ALLEGHENY et al.

Dominant and servient owners—Drainage of water—Collection in drains.

The owners of property on a hillside collected the drainage water at different points and allowed it to flow into ancient water courses. There was no increase in the quantity of water and no change in the places to which it would have eventually gone. Held, that a borough located on the lower ground could not object to this collection of the water and construction of drains.

No. 725 January Term, 1906.

Opinion by YOUNG, J. Filed July 17, 1906.

This is a bill filed by the plaintiff, a municipal corporation, jointly against the county of Allegheny, the township of Chartiers, the Pittsburgh, Crafton & Mansfield Street Railway Company, its lessee, the Pittsburgh Railways Company, and Wood-Harmon & Co., the defendants, to restrain them from collecting, concentrating and discharging large quantities of water upon the streets and highways of the borough of Crafton.

From the evidence in this case we find the following facts:

FINDINGS OF FACT.

1. The plaintiff is a municipal corporation of the commonwealth of Pennsylvania, located in the county of Allegheny, and as such has laid out, opened and improved certain streets and highways, and placed and constructed therein a system of sewerage intended to carry away the surface and other waters and sewage collected from the streets and the properties abutting thereon.

2. The defendant, the county of Allegheny, prior to the filing of the bill in this case, entered upon a certain township road known as the Dinsmore road, and had improved this road as a county road, the work by the county being completed in the summer of the year 1905.

3. This public road, known as the Dinsmore road, in the township of Chartiers, was laid out and opened for travel about 1854 or 1855. At the points complained of in the bill the road was laid out along the hillside, water-tables were dug upon the upper side of the road, and at proper distances and proper places culverts were built from the water-tables to the lower side of the road, so that the waters falling above the road would be discharged at these places upon the property on the lower side of the road. These culverts were so built that the discharges were made onto the ground at natural depressions in the ground, and the culvert which was built at the point which is now the lower end of Harris avenue in West Pittsburgh Terrace was discharged a few feet above a natural running stream of water which was caused by a strong spring in the hillside just below the point of discharge of the water coming from this culvert. These culverts remained open and in use ever since the opening of the road, except for a few years prior to 1905, when the opening at the foot of Harris avenue was closed by Mr. C. C. Craft, the chairman of the street committee of the borough of Crafton, and remained closed until the same was opened by the county of Allegheny when the Dinsmore road was changed from a township road to a county road under the provisions of the act of assembly authorizing its change.

4. The defendant, the Pittsburgh, Crafton & Mansfield Street Railway Company, called in the bill of complaint, the Pittsburgh Crafton & Mansfield Railway Company, and the Pittsburgh Railways Company, lessee and licensee, managing and operating the railway and other properties of the Pittsburgh, Crafton & Mansfield Railway Company, maintain and operate along the eastern and southern side of said public road, so as aforesaid laid out and constructed by the county of Allegheny, a certain street railway with steel rails laid on wooden cross ties,

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placed upon an embankment composed of earth and stone, and along the eastern and southern line of said railway maintain a water drain into which surface and other waters collected from a large area of land lying above said railway are concentrated and conveyed to culverts under and across said railway to the said drain along the upper side of said county road, and during and after rainfalls said waters, together with large quantities of debris are conducted through said culverts into said drain on the upper side of said county road and along the same and into said culverts under and across said road, which waters and debris are thence cast in large quantities and with great force upon the streets and highways of the plaintiff and the properties of the citizens and inhabitants thereof.

5. That the defendants, Charles E. Wood, Clifford B. Harmon and William E. Harmon, doing business as Wood, Harmon & Company, were the agents for the owners of a large track of land lying and being in Chartiers township, Allegheny county, to the east and south of the plaintiff borough, and at a higher elevation than same and being such agents for the owners divided the said track of land into building lots, fronting upon certain streets, located and graded by the said Wood, Harmon & Co., and made water drains constructed of boards and planks into which all surface waters falling upon said track of land are rapidly concentrated and carried in large quantities and at great speed into the above mentioned drains on the upper side of said railway, which waters with debris collected by them are conveyed through said drains and thence into the drain on the upper side of said county road and said street railway and along and across said railway and road to and upon the streets and highways and into the sewers of the borough of Crafton and upon and over the properties of the citizens and inhabitants thereof.

6. The culverts of the Pittsburgh, Crafton & Mansfield Street Railway Company are properly placed in the natural and ancient water courses on the hillside above Crafton borough, and the drains and culverts of said company do not improperly collect the surface waters or divert them from their natural channels.

7. The culverts of the Pittsburgh, Crafton & Mansfield Street Railway Company are placed above and at the same points on the hillside as the culverts under the county road, and said last mentioned culverts were constructed in their present locations more than forty years prior to the filing of the bill of complaint in this case.

8. The construction of the track, roadbed, drains and culverts of the Pittsburgh, Crafton & Mansfield Street Railway Company has not affected the flow of surface waters below the county road, and the same amount of surface water would be conducted through the drains under the county road if the street railway had never been built.

9. That the sewers under the improved county road were properly placed in the natural water courses and do not improperly collect the surface waters or divert them from the natural channels.

10. That the sewers under said improved county road were placed there within two years, and there is no evidence to show that within that period any additional water has been thrown into the streets, or in the borough of Crafton, than was prior to the construction of said sewers.

11. That the county of Allegheny by the improvement of said road or construction of sewers under the same has not changed or affected the flow of water from what was customory and usual immediately prior to said improvement.

12. That the title to the lands mentioned in the fifth paragraph of plaintiff's bill is not in the defendants, Wood, Harmon & Co., but that the legal title to the part of said premises known as the "West Pittsburgh Terrace" plan of lots is in Robert T. Paine, Jr., and the legal title to the part of said premises known as "Crafton Terrace," the plan of lots is in William E. Harmon (excepting such lots in said plan as have been sold by them) and that said defendants, Wood, Harmon & Co., have no interest therein except as agents for the aforesaid owners.

13. That the total number of lots within said plans of "West Pittsburgh Terrace" and "Crafton Terrace" lying within the watershed complained of in plaintiff's bill is about 214, and that said lots are of the average size of 25 by 100 feet.

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14. That deeds of conveyance have been made by said William E. Harmon and Robert T. Paine, Jr., for all of said lots lying within said water shed (excepting 13 lots) to a great number of persons, many of whom have erected dwellings on the lots purchased by them, and that the owners of the lots in said two plans have an association whose duty it is to care for the maintenance of the streets, alleys and water courses of said plan and expend the contributions of the lot owners for that purpose, and that the defendants, Wood, Harmon & Co., have no control over said streets, alleys and water courses.

15. That neither of said plans of lots abuts upon the borough of Crafton and that no waters therefrom are immediately discharged upon or into plaintiff's streets, highways and sewers or upon properties of the citizens and inhabitants thereof.

16. The dwellings erected and other improvements made by the borough of Crafton by grading and paving streets, and filling in and leveling of lots, interfered with and changed the ancient and natural water course by which the water from the culvert at the lower end of Harris avenue, and the ancient spring just below this point flowed from said culvert down toward the lower land of Crafton borough and thence into Chartiers creek, and has caused water to flow in other places, chiefly down Walnut street in the borough of Crafton, instead of in the ancient and natural water course.

17. The plans of lots known as Crafton Terrace and West Pittsburgh Terrace have no streets or alleys connected directly with any highways of the township of Charties or the county of Allegheny. There is no public highway near these plans, except the Dinsmore road, and this is wholly separated from the plans by the private right of way of the street railway company, and no public highway has ever been laid out across this private right of way.

18. The streets and alleys in the plans of Crafton Terrace and West Pittsburgh Terrace have been laid out, improved, kept in repair, boardwalks built thereon, and the drainage thereof provided for by the lot owners of these respective plans, and the township of Chartiers has never accepted as highways any of these streets or alleys or in any way become liable for their maintenance and repair.

19. The concentration of the water by the drains on the Wood, Harmon & Company plan of lots has not caused other waters to flow into the drain on the southern side of the street railway than would flow there naturally, nor has it increased the volume of water which can naturally flow from the territory covered by the Wood, Harmon & Company plan of lots.

20. The placing of a drain on the upper or southern side of its roadbed and the building of culverts under the roadbed to discharge the water from the drain upon the Dinsmore road by the Pittsburgh, Crafton & Mansfield Street Railway, and the maintenance of said drains and culverts by the Pittsburgh Railways Company has not caused any water to be collected or discharged that would not naturally be collected and flow to the Dinsmore road.

21. None of the defendants have added to the volume of water which would naturally be drained to and discharged into the ancient water course near the head of Walnut street and where the water from the land now drained into said ancient water course has been accustomed to flow for more than forty years.

22. None of the defendants have added to the volume of water which would naturally be drained to and discharged into the ancient water course near the head of Josephine street and where the waters from the land now drained into that water course has been accustomed to flow for more than forty years.

23. None of the defendants have added to the volume of water which would naturally be drained to and discharged into the ancient water course west of the junction of Elmwood avenue with Dinsmore street on the McMunn property and where the water from the land now drained into that watercourse has been accustomed to flow for more than forty years.

We conclude as matter of law as follows:

CONCLUSIONS OF LAW.

1. The owners of the lots in the Pittsburgh Terrace and Crafton Terrace plans of lots have a right to collect the water in

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drains and discharge it into the drain on south side of the the street railway, and in doing so are not liable in damages or otherwise to the borough of Crafton.

2. The Pittsburgh, Crafton & Mansfield Street Railway Company and its lessee, the Pittsburgh Railways Company, has the right to collect the waters from the territory south of its tracks into its drain and to discharge the same by culverts into the drain on the south side of the Dinsmore road, and in doing so is not liable in damages or otherwise to the borough of Crafton.

3. The county of Allegheny has the right to receive and collect the water from the south side of its road and to discharge the same into the ancient water courses near the head of Walnut street, Josephine street and the McMunn property, and in doing so is not liable to the borough of Crafton in damages or otherwise.

4. The township of Chartiers has not accepted or become in any way liable for the maintenance or control of the streets or highways in the Crafton Terrace or Pittsburgh Terrace plans of lots, nor for any damage caused by the collection or discharge of any waters upon the streets of the borough of Crafton.

5. The bill should be dismissed as to all the defendants.

DISCUSSION.

The borough of Crafton occupies the low land lying along the Chartiers creek and extending up the hillside to the Dinsmore road. The township of Chartiers includes the land from the northern side of the Dinsmore road to points eastwardly, westwardly and southwardly beyond the points in controversy in this case. The Pittsburgh, Crafton & Mansfield Street Railway Company and its lessee, the Pittsburgh Railways Company, maintain a double track railway parallel with and only a few feet from the Dinsmore road. Wood, Harmon & Co., a partnership as agents for the owners, has laid out a plan of lots within the township of Chartiers and adjacent to the right of way of the Pittsburgh, Crafton & Mansfield Street Railway. Wood, Harmon & Company in laying out their plans of lots have constructed streets and alleys and have placed upon them drains for the purpose of draining the surface water from the plan of lots, and these drains collect and concentrate the waters from the plan of lots to different points along the southerly side of the street railway, so that the waters collected are discharged into a drain maintained by the street railway upon its southern side. The drains upon the plan of lots have been maintained by joint contribution of the lot holders. The Pittsburgh, Crafton & Mansfield Street Railway Company, and its lessee, have constructed and maintain along the southern side of its road drains where the waters from the territory on the southerly side of the road is collected, and this water is discharged by means of culverts placed at different points under the street railway so as to discharge the water collected in the drain into the drain on the southerly side of the Dinsmore road. These culverts under the street railway have been constructed at points near to certain culverts constructed under the Dinsmore road. The township of Chartiers about the year 1855 constructed the Dinsmore road, a township road, and along its southerly side opened and maintained water tables or drains for the purpose of collecting waters from the territory on the southerly side of the road, and constructed and maintained culverts at different points under said road by means of which the waters collected in the drain were discharged over and upon the property lying adjacent on the northerly side of said Dinsmore road. These culverts under the township road were near the junction of Josephine street and the Dinsmore road, near the southerly terminus of the present location of Walnut street in the borough of Crafton, and west of the junction of Elmwood avenue with the Dinsmore road on the McMunn property. The culvert near the head of Walnut street, since about 1855, has been accustomed to discharge its waters at a point north of the Dinsmore road about 15 feet northwardly from an ancient water course through which the waters from a certain spring were accustomed to flow and at a distance of less than 20 feet from the spring-head, and whence the waters flowed to Chartiers creek.

The culvert at the head of Josephine street for more than forty years has been accustomed to discharge its waters into an

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ancient, well defined water course, whence it flowed to Chartiers creek, and the culvert near Elmwood avenue upon the McMunn property has for the same length of time been accustomed to discharge its waters into an ancient, well defined water course, whence it flowed into Chartiers creek. Thus, it will be seen, the water is discharged from the territory covered by the Pittsburgh Terrace and Crafton Terrace plans of lots into a trench or drain on the upper side of the street railway; the street railway receives this water and discharges it into a drain on the upper side of the township, now county, road; the county receives this water into its drain and discharges it onto property within the borough of Crafton through culverts under the county road. These culverts, and especially the culvert complained of at the head of Walnut street, discharge their water where it has been accumstomed to flow for more than forty years; and as to the culvert at the head of Walnut street, that water has always found an outlet by a channel which it had made for itself for a distance of fifteen or twenty feet to an ancient water course down which water was accustomed to flow many years ago from a spring and from a coalpit, and from the culvert of which complaint is made. This ancient water course, by the grading of lots, streets and alleys, has been filled up and the water thus turned aside and now finds its way onto Walnut street. If the defendants have contributed to the increase in the volume of water which had been accustomed to flow through the culverts under the county road by draining a larger area of land than was drained to those culverts, they or such of them as contributed to the increase should be restrained. But the evidence shows that the entire water shed south of the Dinsmore road, which is now drained into the trench on the south side of the road, has been drained there for more than forty years by reason of the natural sloping of the ground towards the south side of the Dinsmore road, and that the culverts under the Dinsmore road were for that length of time discharging all the water from that water shed to a point below the road, and as to the culvert near Walnut street, to a point where it made for itself a channel for a distance of some fifteen or twenty feet, at which point it emptied into a water course made by a spring less than twenty feet away and into which also flowed the water from a coalpit also less than twenty feet away, making a well defined water course, and that water now flows onto Walnut street by reason of the ancient water course being filled up by the grading of lots, streets and alleys in the borough of Crafton. True, the evidence shows that the water from the spring and the coalpit has long since ceased to flow in this ancient water course, and that at the time the water was first discharged by the culvert under the Dinsmore road into it it was a well defined water course and continued to be for at least twenty-five years. It will thus be seen that the volume of water has not been increased by any act of the defendants, nor has any water been diverted to the culvert near the head of Walnut street which would naturally flow elsewhere. This is true also as to the culvert at the head of Josephine street and on the McMunn property, respectively east and west of the culvert at Walnut street. All that any of the defendants has done has been to collect the water by draining and then to discharge it into the ancient water courses; the Pittsburgh Terrace and Crafton Terrace people to the street railway; the street railway to the county road, and the county, through the old culverts, into the ancient water course.

Under this state of facts the conclusions of law are irresistible that the dominant owners have a right to collect water by drains upon their land and discharge it upon the lower land where it is received without objection, and finally discharged by the last recipient into the ancient water course.

For plaintiff, *O. R. Cooke, John O. Petty.*
For defendants, *Reed, Smith, Shaw & Beal.*

A rather peculiar system of therapeutics which, however, the courts holds to be a practing of medicine, is revealed in O'Neil v. State, 90 Southwestern Reporter, 627, where it is held that a person who diagnosed his patients, diseases by microscopic examination of a drop of blood, and treated them by placing them under the rays of electric arc lights; practiced medicine within the meaning of the Tennessee statute.

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(Common Pleas No. 2, Allegheny Co.)

MORGENSTEN v. HERRON.

Mumicipalities—Electric bureau—Cancellation of permit—Validity of rules.

The superintendent of the electric bureau of Pittsburgh cancelled a permit for electric wiring on the ground that the work did not conform to a rule of the department. It appeared that the rule was not in force, and that the work was not dangerous and was satisfactory to the Board of Underwriters. Held, that the permit could not be cancelled.

No. 399 April Term, 1906.

Opinion by SHAFER, J. Filed June 6, 1906.

The bill is against the superintendent of the bereau of electricity of the city of Pittsburgh to restrain the defendant from cancelling a permit given to the plaintiff to do certain electrical work and from interferring with the plaintiff in the performance of that work.

FINDINGS OF FACT.

1. The complainant is an electrician doing business in the city of Pittsburgh, and the defendant was at the time of filing the bill the superintendent of the bureau of electricity of the city of Pittsburgh.

2. In January, 1906, the complaiant entered into a contract to wire for switches for electric light certain floors in the Wabash railroad station, and immediately thereafter complainant applied to the defendant as superintendant of the bureau of electricity and obtained from him the permit required by an ordinance of the city of Pittsburgh to do the work in question in accordance with the laws and ordinances regulating the placing of wires in buildings in the city of Pittsburgh.

3. In pursuance of his contract and the permit so given complainant proceeded to do the work, and while he was engaged in doing it the defendant objected to the manner in which the work was being done, claiming that it was not in accordance with the laws and ordinances of the city, and thereupon gave notice to the complainant that his permit to do the work in question was cancelled and that if he continued to work on the job his men would be arrested and fined.

The dispute between the parties was founded upon the interpretation put by the defendant on rule 17 of the printed rules of the department, and whether or not the rule was in force. The ordinance of the city of Pittsburgh authorizing the making of such rules by the department of public safety requires them to be approved by council, and it does not appear that the rule in question was ever so approved.

The manner in which the work was being done by the complainant was not dangerous in any respect and was satisfactory to the inspectors of the National Board of Fire Underwriters, from whose rules the rule in question seems to have been copied.

CONCLUSIONS OF LAW.

Under the facts of this case we are of opinion that the defendant had no right to revoke the permit given by him to the complainant nor to interfere with the work being done by him. We understand that, the work having been done since the hearing under the supervision of the defendant or his successor in office, there is no question now between the parties except as to the costs of this case.. Under the circumstances we see no reason for putting any of the costs on the plaintiff.

An injunction is therefore granted restraining the defendant from cancelling the permit in question, and from interfering in any manner with the complainant in the performance of the work in question, the costs to be paid by the defendant.

For plaintiff, *G. K. Wright.*

For defendant, *W. B. Rodgers.*

In Haskel v. Boston District Messenger Co., 76 Mortheastern Reporter, 215, it appeared that the messenger compayn furnshed to plaintiff a messenger who during the time of the employment was not under the control of the messenger company, and that plaintiff entrusted a bill to the messenger who collected the same but failed to turn over the proceeds. Under these circumstances it is held that the company is not liable for the money in the absence of any showing that it was negligent in selecting the messenger.

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PITTSBURGH, PA., OCTOBER 10, 1906.

Court of Common Pleas No. 2,

ALLEGHENY COUNTY.

WESTERMAN v. VERONA CEMETERY CO. et al.

Cemetery—Dedication for cemetery purposes—Trust—Violation of trust.

The owner of a tract of land made a verbal agreement with a cemetery company organized for the purpose, dedicating the land for cemetery purposes, and agreed that after she received $3,000 from the sale of lots the balance of the money received from sales of lots should be held for maintenance of the cemetery. A plan of the cemetery was drawn up and the owner made various deeds for lots reciting in them the plan and other matters. The cemetery company was organized but had no meetings for years. The treasurer was the agent and husband of the owner of the land and made sales of lots from time to time.

Held, that a trust was established, that the land should be held exclusively for burial purposes and the owner should be enjoined from conveying any portion of it for other purposes.

No. 160½ July Term, 1905. In equity.

Opinion by YOUNG, J. Filed July 20, 1906.

This is a bill by a lot holder for himself and other lot holders of the Verona Cemetery to restrain certain of the defendants from selling or using certain land claimed to be part of the Verona Cemetery in any other manner than for cemetery purposes; to declare that all the land included within the cemetery be held in trust for the Verona Cemetery and for cemetery purposes exclusively and to compel the Verona Cemetery, the corporation, to take charge of the land and maintain it for cemetery purposes exclusively.

From the evidence in this case we find the following facts:

1. That in 1881 Salinda Anderson, wife of William Anderson, and the mother of William F. Anderson and Margaret V. Daubbs, was the owner in fee of the land described in the bill situate in the borough of Verona, now borough of Oakmont, in the county of Allegheny, bounded on the north by E street, on the south by D street, on the west by a twenty-four foot alley, and on the east by Tiers and others; except certain lots therein which before that time Salinda Anderson had conveyed to persons for burial purposes.

2. Salinda Anderson and her husband, William Anderson, by their deed dated July 16, 1881, and of record in the recorder's office of Allegheny county in deed book vol. 421, page 666, conveyed to Thomas Westerman, the plaintiff, as recited in the deed, "a lot of land in the cemetery of the said Salinda Anderson, called Verona Cemetery, for burial purposes, situated in the said borough of Verona, Allegheny county, Pa., which lot is delineated on the map or plan of said cemetery as laid out by Edeburn & Cooper, in the possession of said Salinda Anderson, and is therein designated as lot No. 1, block D, range No. 1, containing 256 square feet. To have and to hold the premises hereby granted to the said Thomas Westerman, his heirs and assigns forever, subject, however, to the conditions and limitations and with the privileges prescribed in the rules and regulations of said cemetery." And the "rules and regulations of the Verona Cemetery" are printed in full upon the third page of the deed.

3. Prior to January. 1882, William Anderson suggested to certain persons that a cemetery company be incorporated, and on January 3, 1882, at No. 220 March term, 1882, the Verona Cemetery was duly incorporated by a judge of the Court of Common Pleas No. 1 of this county upon the petition of twenty residents of Verona and that vicinity, including William Anderson, for the purpose of the "maintenance without profit of a public cemetery in said county of Allegheny for the burial of the dead, and without distinction or regard to sect," with power to purchase land in the county not exceeding $3,000 for cemetery purposes.

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4. The plan of the Verona Cemetery referred to in the deed had been prepared by Edeburn & Cooper by direction of Salinda Anderson, through her husband, William Anderson, before the incorporation of the cemetery company and the making of the deed to plaintiff, and that plan was used until its loss about 1890 for the information of proposed purchasers of lots by W. D. Houghtelin, the sales agent of Anderson and the corporation, as set out in the sixth finding of fact.

5. About the time of the incorporation of the cemetery company William Anderson, acting for his wife, agreed with the promoters of the corporation or with the board of managers that the lots in the plan should be sold to persons who wished to purchase, and after $3,000 had been paid to the owners of the land the money arising from the sale of lots should constitute a fund for the maintenance of the cemetery.

6. William Anderson, as agent for his wife, employed W. D. Houghtelin, secretary of the corporation, to make sale of lots, and William Anderson, as treasurer of the corporation, received from Houghtelin the purchase money, paid the expenses of maintaining the cemetery, and accounted to the corporation January 1, 1883, for the money received and expended to that time, including a deduction of $132 interest on $2,200 for one year at 6 per cent, the balance due Salinda Anderson under the agreement.

7. In 1901 Edeburn & Cooper by direction of William Anderson, then surviving husband of Salinda Anderson, and tenant by courtesy of the real estate of which Salinda Anderson died seized, and as attorney in fact for his children, William F. Anderson and Margaret V. Daubbs, resurveyed the Verona Cemetery and reproduced the plan attached to the bill of complaint, which is substantially the same as the original plan made in 1881 and referred to in plaintiff's deed.

8. The corporation has had neither meetings nor an election of officers for many years, has taken no part either in the sale of lots or in the maintenance of the cemetery; but Mr. Houghtelin continued to sell lots as agent for Anderson, he, at the same time, being secretary of the corporation, and Anderson, as agent for his wife until her death on March 11, 1889, and thereafter as tenant by courtesy until September 24, 1901, and as attorney in fact for his children, and while he was treasurer of the corporation continued to receive the proceeds of the sale of the lots, and out of this money to pay for the maintenance of the cemetery, retaining the balance of the money in his own possession.

9. From January, 1882, the date of the incorporation of the cemetery company, to March 25, 1905, Anderson has received $5,812.50, or $2,812.50 in excess of the purchase money which he was entitled to receive, being a large amount over and above any interest he was entitled to receive.

10. Since January, 1882, and prior thereto and until March, 1905, the cemetery, as shown in the plan attached to the bill of complaint, has been staked and fenced along D street, E street, the 24-foot alley and the line of Tiers and Kletzley on the east of the cemetery, and the center street 20 feet wide lying north and south through the central circle was kept open, graded and cleared from E street to the 4-foot cross-walk between ranges 7 and 8, block D, and within 120 feet of D street, and the center street running east and west through the central circle has been kept opened, graded and cleared, and the 4-foot cross-walks between ranges have been kept opened, graded and cleared in all blocks, namely, A, B, C and D, from E street to the line between ranges 7 and 8 in both blocks C and D; and between 400 and 500 have been buried in the cemetery and many lots sold, 25 to 30 in block A, all of block B except two lots, 14 or 15 in block C, and different lots in all the ranges of block D, except that no lots have been sold in block D south of range 6, and and over 100 monuments have been built and many head-stones placed, and the whole cemetery generally from D street on the north to E street on the south, and from the 20-foot alley on the west to the Tiers and Kletzley line on the east has been maintained as a cemetery except that no graves were made south of range 6, block D, and no walks maintained south of the dividing line between ranges 7 and 8 in block D.

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11. Until the death of Salinda Anderson on the 11th of March, 1889, as agent for his wife, and from March 11th, 1889, until September 24, 1901, as tenant by courtesy, when he quit-claimed his interest to his children, and from February 21st, 1901, until the present time as attorney in fact for his children, William F. Anderson and Margaret V. Daubbs, during all of which time from January, 1882, he was also treasurer of the cemetery company, William Anderson carried on and conducted all negotiations for the sale of lots, for the maintenance of the cemetery, and all other transactions relating to the affairs of the cemetery or its transactions with the persons holding or claiming to hold title to the land included in the plan of Verona Cemetery.

12. The land shown by the plan attached to the bill of complaint has been exempt from taxation as a burial ground for more than 21 years.

13. The defendants, William F. Anderson and Margaret V. Daubbs, by their deed dated January 4, 1905, and duly recorded, conveyed to Thomas S. McAnlis, also a defendant, in fee simple, that portion of the land shown on the plan of the Verona Cemetery fronting on D street 138.12 feet and extending in depth from the center of D street northwardly 180 feet, thus including in the deed that portion of the cemetery designated on the plan as ranges 11, 10, 9, 8 and part of 7 of blocks C and D.

14. Some time prior to the delivery of this deed by the heirs of Salinda Anderson to him Thomas S. McAnlis was on the land and knew that the land which he proposed to purchase was included within the fences about the cemetery; could have seen on the ground which he proposed to purchase evidence of the 20-foot center road running from the central circle, and the cross-walks between all the ranges as far south as range 8, block D; could have seen the stakes at the corners of the ranges or sections, some of them on the land he was about to buy, and he knew that the land was supposed to be a part of the cemetery and that the cemetery had been chartered for many years.

15. The deed of Salinda Anderson to Thomas Westerman, the plaintiff, was recorded in the recorder's office of Allegheny county on August 29, 1881, and could have been discovered in looking for conveyances by Salinda Anderson of the original tract of which the portion purchased by McAnlis was a part, and that the deed referred to the plan of the cemetery as a part of the deed, and an examination of that plan would have put in possession of McAnlis the information that the land he proposed to purchase was included in the plan of the cemetery.

16. Thomas S. McAnlis by his deed dated January 28, 1905, duly recorded, conveyed to William Armstrong, also a defendant, the land conveyed to him by William F. Anderson and Margaret V. Daubbs, and said William Armstrong now claims to hold the said land in fee simple free from any conditions or obligations to use it only for cemetery purposes.

17. William Armstrong, before he purchesed the land, visited the land with his grantor, McAnlis, and could have seen the continuation of the old fence about it; the new cross fence running east and west through range 7, block D; the improved part of the same, which is outside of the new fence, the monuments near this fence; the range stakes; the open and graded 20-foot center walk between the new fence and D street, appearing to be a continuation of the 20-foot center walk from the central circle; the 4-foot walk running east and west between ranges 7 and 8 of block D, between the new fence and D street, and, generally, evidence on the ground that the part enclosed and which he was about to purchase from McAnlis was or had been lately a part of the cemetery.

18. The deed from Salinda Anderson to Thomas Westerman, the plaintiff, was recorded in the recorder's office of Allegheny county on August 27, 1881, and could have been discovered in looking for coveyances by Salinda Anderson of the original tract, of which the portion purchased by William Armstrong was a part, and this deed referred to the plan of the cemetery as a part of the deed, and an examination of that plan would have put in possession of William Armstrong the information that the land which he proposed to purchase was included in the plan of the cemetery.

We conclude as matter of law as follows:

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CONCLUSIONS OF LAW.

1. Salinda Anderson, by her deeds to plaintiff and other lot holders, and by making and adoption of the Edeburn & Cooper plan, which was made a part of the deeds for lots in the Verona Cemetery dedicated the land shown by the plan as a cemetery to be used for burial purposes, and she and her heirs are estopped from selling or using the land for any purpose except that of burial.

2. Salinda Anderson having dedicated the land as a cemetery or public burial ground, and having agreed with the Verona Cemetery Company as set forth in the fifth finding of fact, a trust was thereby created by the terms of which the corporation known as the Verona Cemetery should dispose of the lots for burial purposes; should receive the proceeds of such sale; should pay to Salinda Anderson or her heirs the sum of $3,000. with interest, and the remaining lots shown by the Edeburn & Cooper plan attached to the bill of complaint should be sold by the Verona Cemetery and the proceeds thereof constitute a trust fund for the maintenance of the cemetery.

3. That there is included in the Verona Cemetery and to be held in trust as found in the first and second conclusions of law all the land shown on the plan attached to the bill, bounded on the north by E street, on the south by D street, on the east by line of Tiers and Kletzley, or their successors in the title, and on the west by a 24-foot alley.

4. That the Verona Cemetery, the corporation, should be required to take charge of the lots remaining unsold as shown by the plan attached to the bill of complaint, to sell the same for burial purposes only and to hold the proceeds thereof in trust to be used for the maintenance of the cemetery hereafter and that the cemetery should reorganize, elect its managers and officers and conduct the business for which it was incorporated, including the performance of the duties of the trust, as set out in the second conclusion of law.

5. That Thomas S. McAnlis is not an innocent purchaser for value without notice of the land described in the deed of William F. Anderson and Margaret V. Daubbs to him, and that he took the same with notice that it was included within the Verona Cemetery and could be used only and exclusively for burial purposes.

6. That William Armstrong is not an innocent purchaser for value without notice of the land described in the deed of Thomas S. McAnlis to him, and that he took the same with notice that it was included within the Verona Cemetery and could be used only and exclusively for burial purposes.

7. That William F. Anderson and Margaret V. Daubbs should be restrained from selling or conveying any of the land shown by the plan of the Verona Cemetery.

8. That William Armstrong be restrained from conveying or using any of the said land described in his deed, for any purpose except for burial purposes, and that he remove the fence built between the lot conveyed to him and the cemetery.

9. That the costs of this proceeding be paid by all the defendants in equal proportions.

Let a decree be drawn accordingly.

DISCUSSION.

Some time prior to 1881, Salinda Anderson, as one of the heirs of Peter Bright, took title to the land in controversy in this case. A portion of the land in controversy had been used by the Bright family as a family burial ground, and after Mrs. Anderson acquired title she disposed of lots to persons desiring to own lots for burial purposes. So that up to the year 1881 the land was used as a graveyard, and in that year she procured a plan to be made by Edeburn & Cooper of the land in controversy, which at that time was intended by her to be devoted to cemetery purposes. After the making of the plan printed deeds were prepared by her which referred to the plan of the cemetery, and some of these deeds she executed and delivered for lots within the plan, and among others the deed to the plaintiff in this case. Late in the year 1881 William Anderson, the husband of Salinda Anderson, approached certain citizens of the borough of Verona and suggested to them that a cemetery company be incorporated and that the land of Salinda Anderson included in the plan be taken by that cemetery company for a public burial ground. Thereupon twenty citizens of the borough of Verona, including her husband, William Anderson,

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petitioned the Court of Common Pleas No. 1 of this county for a charter under the title of Verona Cemetery Company, which was granted on January 3, 1882. William Anderson was named as one of the managers and was elected by the board of managers as treasurer of the company. About that time William Anderson, acting for his wife, agreed with either the applicants for the charter or the board of managers of the corporation that the land set out in the Edeburn & Cooper plan in the possession of Mrs. Anderson should be taken by the cemetery company, lots sold for burial purposes, the proceeds of the sale of lots to be paid to Mrs. Anderson, and when she had received $3,000 the remainder of the lots to be sold from time to time and the proceeds used as a trust fund for the improvement and maintenance of the cemetery. The Edeburn & Cooper plan included all the land as shown upon it between E street on the north, D street on the south, the 24-foot alley on the west and the line of Tiers and Kletzley on the east. Pursuant to this arrangement William Anderson employed W. D. Houghtelin, secretary of the corporation as his agent to sell the burial lots and he himself disposed of some lots. The proceeds of the sale of lots by Houghtelin was paid over to Anderson by him after deducting his commission for sale, and this money together with that received by Anderson for the sale of lots (Anderson all the time being treasurer of the cemetery company) was in January, 1883, accounted for by Anderson as treasurer, who made a report to the cemetery company showing the amount of money received by him up to that time, the money laid out and expended by him in improving the cemetery ground, and deducting the sum of $132 interest at 6 per cent on the sum of $2,200, being evidently the balance of the purchase money due Mrs. Anderson at that time. This is the only report that was made by Anderson to the cemetery company and no election of officers was held by the cemetery company thereafter, although meetings were held from time to time.

Houghtelin, as secretary and as an employe of Anderson, and Anderson himself continued to sell lots until March of 1905, and the money received by Houghtelin less his commission for sale was turned over to Anderson who was also treasurer of the cemetery company. Houghtelin received for the sale of lots to March 25, 1905, $6,952.80, which amount, less his commission of $1,140.30, leaving a balance of $5,812.50 he paid over to Anderson, so that Anderson received up to March 25, 1905, $2,812.50 over and above the purchase money of $3,000 agreed upon, and almost a thousand dollars more than he was entitled to by way of interest.

On March 11, 1905, Anderson notified Houghtelin in writing "not to sell any more lots in the cemetery, nor to allow any graves to be opened only where lots had been sold and paid for, nor to allow any more work to be done on the cemetery without orders from him." It appears that up to this time the cemetery had been improved by Houghtelin until about 1896, and after that time until the time of the hearing in this case by William Dougherty as sexton of the cemetery, and the expense of the improvements was paid by William Anderson. Up to the time of receiving this notice by Houghtelin the cemetery had been improved by the laying out of a center piece, by the running of two streets respectively east and west and north and south through this central circle, and each of them 20 feet wide; and this main street running north and south had been opened, graded and improved from E street to a point between ranges 7 and 8 in blocks C and D, and cross-walks between the ranges four feet in width had been opened, graded and cleared as far south as between ranges 7 and 8 in block D. The whole cemetery as shown by the plan was enclosed by badly kept fences extending respectively along D street, E street, the 24-foot alley and the line of Tiers and Kletzley. Stakes had been placed at the corners of the ranges covering the entire plan, and it was perfectly apparent in the fall of 1904 that all the land from E street to D street and from the alley to the Tiers and Kletzley line was included in and was used for a cemetery.

In the fall of 1904 William Anderson, as attorney in fact for his son, William F. Anderson, and his daughter, Margaret V. Daubbs, having prior to that time quit-claimed his courtesy to his children, agreed with Thomas McAnlis to sell him a portion of the land included within the cemetery, fronting the whole length of the front line of the cemetery on D street and extending back from the center of D street 180 feet or 150 feet from the north line of D street to a point within the cemetery in range 7 of block D. At the the time of the purchase by McAnlis he was well acquainted with the land in the neighborhood, visited the land in contro-

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versy before his purchase, could have seen the fences referred to above and could have ascertained in the examination of the title in looking for conveyances by Salinda Anderson for burial purposes the deed to the plaintiff in this case and other deeds which contained a reference to the plan of the cemetery and which upon inquiry he would have discovered included the land which he was about to purchase. McAnlis, however, neglecting to observe the things which he should have observed took a deed for the land, his deed being dated January 3, 1905, at once built a fence between the rear of the lot and the rest of the cemetery, and on January 28, 1905, conveyed the land in fee simple to William Armstrong. Armstrong visited the lot before purchasing from McAnlis and could have discovered the marks upon the ground showing that the land he was about to purchase was included within the cemetery, and although the fence had been built by McAnlis, could have discovered that this was a new fence and that the center walk extended to a point between the new fence and D street and within the lot which he proposed to purchase. Under this state of facts can it be doubted that it was the intention of Mrs. Anderson to dedicate the portion of the land lying between E street and D street and the 24-foot alley and the line of Tiers, where some of her kindred had already been buried, as a public cemetery? Can there be any doubt that her references in her deeds, her agreement, through her husband, with the cemetery company and the incorporation of the cemetery company, show both a written and an oral dedication of the land for this public purpose? Can it be doubted that William F. Anderson and Margaret V. Daubbs, the children of William Anderson, ought not to be permitted, after such a solemn dedication for such a purpose by their mother twenty-five years ago, to pervert that charitable intention and to sell the land, thus destroying the symetry of the cemetery and thus perverting the good intention of their mother?

William Anderson, under this state of facts, should be required to pay over to the cemetery company all the money which he has received in excess of the sum agreed to be paid for the land, and William F. Anderson and Margaret V. Daubbs should be required to pay over to the cemetery company the money they received from Thomas McAnlis for the sale of the lot of ground which is a portion of the cemetery company, but under the prayers of the bill we cannot grant that relief in this case. The Verona Cemetery Company ought, under the facts proved in this case, at once to reorganize the cemetery, receive the money, conduct the sale of lots and use the entire proceeds as a fund in trust for the improvement, preservation and maintenance of the cemetery. William Armstrong may be permitted to sell the ground which he has purchased and to make sale of the same for burial purposes, he receiving the purchase money for which he may sell the lots, but he should be required to remove the fence so as to restore the original outlines of the cemetery and he should be restrained from selling or using the land conveyed to him for any purpose except that of burial.

For plaintiff, *Thomas & Meals.*

For defendants, *R. A. & Jas. Balph.*

HUMOR OF BULLS AND BLUNDERS. Edited by Hon. Marshall Brown. Boston: Small, Maynard & Company, Publishers, 1906.

Judge Brown has a keen sense of the humor which is always cropping out in the serious matters of life as well as in the idle and playful times. It takes a man who ever sees the joke in whatever form it occurs to successfully dish it up for the enjoyment of his fellowmen. When "Wit and Humor of Wellknown Quotations" was published we saw this quality of our esteemed judge well displayed. In "Humor of Bulls and Blunders" we have the same apt enjoyment of the humors of daily life as it appears in its various phases. The book is highly entertaining, one to be kept on the library table and taken up frequently in order to enjoy a good laugh and drive away the blues. While it is designed principally to amuse, the volume has an instructive value in suggesting the importance of clearness of expression and simplicity of style. There is no better way of conveying an idea of its contents than by quoting from the book at random, as follows:

"Wanted—A saddle-horse for a lady weighing nine hundred and fifty pounds."

"Wanted—By a respectable girl, her passage to New York—willing to take care of children and a good sailor."

"Why did'nt you put my luggage in as I told you?" asked an irate passenger as the train was moving off."

"Eh, mon; yer luggage is no sic a fule as yerself.' Ye're in the wrong train."

"Doctor: "What! your dyspepsia no better? Did you follow my advice and drink hot water one hour before breakfast?

"Patient: "I did my best, doctor, but I couldn't keep it up for more than ten minutes.

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PITTSBURGH, PA., OCTOBER 17, 1906.

Court of Common Pleas No. 2,

ALLEGHENY COUNTY.

UNION REALTY CO. v. DETCHON

Equity—Practice—Answer and cross-bill.

An answer and cross-bill filed in one paper is not good practice.

No. 519 January Term, 1906. Demurrer.

Opinion by FRAZER, P. J. Filed February 7, 1906.

In this case defendants have filed to plaintiff's bill an answer and cross-bill in one paper. In the absence of any authority sustaining such practice we do not consider it good pleading, and will sustain the demurrer to the paper filed to the extent that it is intended to be an answer to plaintiff's bill. In other respects the demurrer is overruled. We will consider the paper to be a cross-bill and allow defendants fifteen days to file an answer in accordance with the equity rules, and plaintiff allowed fifteen days to answer cross-bill.

SAME v. SAME.

Corporation—Transfer of entire capital stock—Agreement with officer—Binding on purchaser.

A number of real estate brokers formed the X corporation, taking stock therein and agreeing not to engage in the real estate business except in the employ of the company for ten years. A trust company later purchased all the stock and subsequently sold it to the B corporation. Prior to this transfer B had attempted to purchase the stock, but had failed owing to objections by defendant who was an employe and subject to the ten year agreement. B finally purchased through an agent who stated he represented outside parties, and in order to overcome defendant's objections promised defendant would be released from the ten-year contract.

Held, that B owning all the stock in X could not under the circumstances enforce the ten year agreement, using the name of X against defendant. The defendant was an officer of X and the agreement made by B's agent was binding on it.

Opinion by SHAFER, J. Filed May 12, 1906.

The bill is to enjoin the defendants from engaging in the real estate business in certain districts of western Pennsylvania without the permission of the plaintiff. The defendants have filed a cross-bill against the plaintiff, and one, Robert Hoch, who is made defendant in the cross-bill, praying for the cancellation of the agreement upon which the bill itself is founded. The issues joined upon the bill and cross bill were tried together.

FINDINGS OF FACT.

1. About June, 1901, certain real estate and insurance agents doing business in the city of Pittsburgh agreed to unite their business in one company, and on June 11, 1901, a written agreement was signed by a number of such agents, including the two defendants, by which it was agreed that a company to be called the Union Realty Company should be formed to carry on the real estate and insurance business; that the good will of the several parties should be transferred at certain stated prices to that company, and that none of the parties for ten years from July 1, 1901, should be directly or indirectly engaged in or interested in the business of real estate agency, but that they should give their entire time and attention to the business of the company, and each to be entitled as compensation to fifty per cent of the commissions earned by him and turned over to the company, and it was further agreed that each of the parties should enter into any and all contracts, agreements and transfers that might be required by the directors of the company to carry out the purpose of the agreement.

2. In pursuance of this agreement a charter was applied for under the name of the Union Realty Company, which was granted on August 5, 1901.

3. In September, 1901, the real estate agents forming the company, or some of them, including the two defendants, made bills of sale to the Union Realty Company for all their real estate business and the good will thereof, and all office furniture and supplies, etc., this bill of sale containing an agreement that for ten years from July 1, 1901, they would not engage in the real estate business in the western part or district of Pennsylvania, except on behalf of the Union Realty Company, and that they would in good faith endeavor to turn over to the company all the real estate business which would other-

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wise have come to them; and further, that they would use their best endeavors to promote the success of the Union Realty Company, and during a period of ten years give their entire time and attention to the business of the company, so long as their compensation should not be less than the rate fixed by the agreement of June 11, 1901.

4. In consideration of the bill of sale and agreement aforesaid, the defendant, A. C. Detchon, received 450 shares of the par value of one hundred dollars of the capital stock of the Union Realty Company, and the defendant, John H. Palmer, received 300 shares of the same stock.

5. On March 1, 1902, the defendants, Detchon and Palmer, each executed a further contract with the Union Realty Company, which contracts are printed as exhibits A and B of the bill. These contracts recite the fact that the vendor had been engaged in the real estate business and had agreed to sell the same to the company, and part of the consideration of the sale was the agreement of the vendor to work in the real estate business on behalf of the company for ten years; and it recited the agreement to abstain from the real estate business especially in western Pennsylvania and particularly certain named counties, except in connection with the purchaser. The agreement provided that in consideration of the premises vendor shall not for ten years from March 1, 1902, carry on the real estate business in western Pennsylvania and particularly in the counties mentioned, and that the vendor shall devote his entire time and skill in the conduct of the business for ten years from March 1, 1902, at the office of the purchaser or at such place as the purchaser may direct, and that the purchaser (meaning the company) will pay to the vendor each year one-half of the gross commissions received by the vendor on all real estate transactions conducted by him to the amount of $5,000, and after that amount has been received in any one year, twenty-five per cent of the commissions thereafter. And it is further understood that all expense incident to the procuring of business except general office expenses and advertising shall be paid by the vendor, and that if the vendor should cease to be in the employ of the purchaser during the period of ten years such cessation of employment shall not release him from the covenant to abstain from engaging in the real estate business nor shall any change in his salary have that effect; and further that the company may at any time at its option refuse to employ the vendor, and that such refusal shall not release him from his covenants to abstain from business for ten years, the covenants being stated to be a material part of the consideration moving between the parties in the sale. And further that the purchaser shall have the right to sell and assign this contract to any corporation with which it may merge, or which may become the purchaser of the controlling interest in its capital stock.

6. Shortly after the making of these last mentioned agreements the Iron City Trust Company became the purchaser of all the capital stock of the Union Realty Company, each of the defendants in this case having turned over his stock to that trust company and having received stock of the trust company in lieu thereof.

7. From time to time thereafter a number of the persons who entered into these contracts purchased their release therefrom from the Iron City Trust Company, the lowest price paid by any person for such release being $5,000, and by September 1, 1905, all of the parties had been released except the two defendants and one, J. C. Ewing.

8. From the formation of the company until September 1, 1905, the two defendants were in the employ of the company and were engaged in the real estate and insurance business only on its behalf.

9. In July or August of 1905 John K. Ewing, who was one of the real estate agents forming the Union Realty Company who had been released by that company, was the president of a corporation known as the John K. Ewing Company, which was engaged in the real estate business in the city of Pittsburgh. He had been engaged in more or less litigation with the Union Realty Company and its owner, the Iron City Trust Company, and was not held in favor by the officers of either of those companies. He made a proposition to the Iron City Trust Company for the purchase from it of the stock of the Union Realty Company through the defendant, Detchon, some time early in August, 1905, Detchon being at the time president of the Union Realty Company, but not an officer or stockholder of the Iron City Trust Company. Detchon was unwilling that the company should go into the hands of Ewing, and so informed the president of the Iron City Trust Company and

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requested him to refuse the offer, which was done. Upon this refusal being communicated by Detchon to Ewing, Ewing made an additional offer, which Detchon did not communicate to the officers of the trust company. Shortly thereafter Robert Hawk, the defendant in the cross-bill, came to Detchon and told him that he was desirous of purchasing the Union Realty Company for himself; that he desired to go into the real estate business, and that the capital would be furnished him by a relative of his in New York. Detchon called the attention of Hawk to the agreements with the Union Realty Company which were outstanding made by himself and by Palmer, the other defendant, and gave him to understand that he would oppose a sale unless these agreements were cancelled. Hawk thereupon promised Detchon and afterwards promised Palmer personally that if the sale went through they would be released from these agreements. On the faith of this promise Detchon and Palmer refrained from making any opposition to the sale to Hawk, and a contract was made between the Iron City Trust Company and Hawk for the sale to him of the whole of the stock of the Union Realty Company. Soon after this contract was made and signed Hawk informed the trust company and the defendants and the other employes of the Union Realty Company that he had turned over his purchase to John K. Ewing & Company, the fact being that Hawk was all the time acting as the agent of John K. Ewing & Company for the purchase of the stock for them, for which he was afterwards paid a commission by them. The stock of the Union Realty Company was thereupon transferred by the Iron City Trust Company to John K. Ewing & Company, and is still owned by them, one or two shares being held in the name of some of the employes for the purpose of maintaining the organization of the Union Realty Company.

10. Defendants were unwilling to operate in conjunction with Ewing & Company or under the direction of Ewing, and ceased their employment with the company and went into the real estate business each on his own account, and have been carrying on the same since some time in September, 1905.

CONCLUSIONS OF LAW.

1. The bill is founded upon the agreement of March 1, 1902, long after the stock of the Union Realty Company had been transferred to the defendants in payment of their business and good will under the agreement of September, 1901, and no new consideration for the agreement of March, 1902, appears. It has been frequently held that an agreement in restraint of trade such as this must be founded upon a good consideration, and that the consideration to be implied from the use of a seal is not sufficient to support such an agreement. So far, therefore, as the agreement of March, 1902, undertakes to restrain the defendants from carrying on their business of real estate agents for a longer time or under more stringent or burdensome conditions than those provided in the contract of September, 1901, the agreement must be considered to be void. The agreement of March, however, is practically a confirmation or further assurance of the agreement of September, and so far as it does not undertake to restrict the defendants otherwise than as they were restricted by the agreement of September, it may be considered to be identical with that instrument and may be enforced in this proceeding, although the agreement of September is not mentioned in the bill.

2. The contract of March, 1902, undertakes to add about six months to the term of ten years provided for in the contract of September, 1901, and further provides that the defendants may be discharged at any time by the Union Realty Company and still be bound by their contract to abstain from the real estate business. In these two particulars, we are of opinion that the contract is without consideration and void. The contract of September, 1901, evidently contemplated the employment by the Realty company of the defendants during the whole term. We do not see, however, that this has any effect in the present case for the reason that defendants were not discharged by the Realty company but voluntarily left its employment.

3. The only remaining question in the case is as to the effect of the agreement made by Hawk with the defendants in regard to their release. Ewing & Company had endeavored to buy the Realty company from the Iron City Trust Company, and upon Detchon's opposing the sale the trust company had refused to sell to them. They thereupon sent an agent to pretend to buy the Realty company in his own name, thus deceiving the trust company as to the person with whom they were dealing, and to prevent the opposition of Detchon and Pal-

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mer from interfering with the sale this agent promised them that if the company was sold to him he would release them from their contract. This promise prevented them from making any opposition to the sale and the sale was made to Hawk without any opposition by them but apparently with some assistance on the part of Detchon. While it is true that Detchon and Palmer were not officers or even stockholders, so far as appears, of the Iron City Trust Company, yet they were officers and employes of the Union Realty Company having its office with the trust company, and the opposition of one or either of them to the sale to Ewing & Company might and probably would have had some effect upon the action of the trust company, and this Ewing & Company well knew. Under the circumstances we are of opinion that the promise by Hawk, made for the purpose of furthering the purchase by him, was founded upon a sufficient consideration and was binding upon Hawk and upon Ewing & Company. his principal.

4. While the Union Realty Company is a corporation, every share of its stock belongs, as has been found, to Ewing & Company. It seems to us that Ewing & Company are therefore the substantial plaintiffs in this case, and that they cannot enforce in the name of the Union Realty Company, of which they are the sole owners, any claims which, as Ewing & Company, they have contracted not to enforce, and that under all the circumstances of this case it would not be equitable to enforce the contracts against the defendants by which it is sought to restrain them from carrying on their business as real estate agents, and that the bill should therefore be dismissed.

Let a decree be drawn accordingly.

For plaintiff, *Stone & Stone.*

For defendants, *Samuel S. Mehard.*

(Common Pleas No. 2, Allegheny Co.)

NEELY v. PEOPLES NATURAL GAS COMPANY.

Real estate—Damages to land—Jurisdiction of courts—County where land is located—Act of June 13, 1836.

A brought suit before an alderman in Pittsburgh against the B corporation to recover damages for trespass to land in Armstrong county. Held, that the court had no jurisdiction.

The act of June 13, 1836, provides that such actions shall be brought in the county where the land is located. Where the defendant is a non-resident the sheriff may go beyond his bailiwick into an adjoining county to serve a process in suit to recover damages to land.

No. 482 April Term, 1906. Demurrer to plaintiff's statement.

Opinion by FRAZER, P. J. Filed May 21, 1906.

The statement shows that the plaintiff is the owner of a tract of land situate in Kiskiminetas township, Armstrong county, and that defendant company on or about April 18, 1903, without the consent of plaintiff went upon the land and laid down an eight-inch gas line across the same, which it has continued to maintain and use until the present time. To recover damages for the trespass, plaintiff entered suit before an alderman of the city of Pittsburgh, and recovered a judgment in his favor for the sum of $243, from which judgment an appeal was taken to this court, the statement complained of being subsequently filed. To that statement defendant demurred, alleging inter alia that the Allegheny county magistrate was without jurisdiction.

The act of 1836 provides that "all actions of dower, partition, waste, ejectment, nuisance and all other pleas of land may be commenced in any court of the county wherein the lands or tenements in question are situate having original jurisdiction thereof, either by agreement of the parties in the manner and in the effect provided in case of personal actions or by writ."

In this case the trepass complained of was not committed in Allegheny county, and it seems to us the magistrate of this county was without jurisdiction to hear the case. The land being located in Armstrong county, the witnesses being there, the action could be more satisfactorily disposed of in that county than in this. So far as our attention has been called to the cases upon this question, they are all to the effect that actions of this kind should be carried on in the county in which the land is situated. The fact that the trespasser is a non-resident of that county is immaterial, because the act of 1836 authorizes the sheriff of the county in which the real estate is situate to go beyond his bailiwick into an adjoining county for the purpose of serving any process which may issue in suits instituted for the recovery of damages to land.

The demurrer is sustained.

For plaintiff, *Harvey A. Miller.*

For defendant, *Christy Payne.*

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PITTSBURGH, PA., OCTOBER 24, 1906.

Orphans' Court,

ALLEGHENY COUNTY.

In re Estate of MARTHA J. CARROLL, Deceased.

Adoption—Measure of damages for breach of contract for adoption—Married woman.

Where the wife of a petitioner to adopt a child does not join in the petition, parol evidence is not competent to show that it was the intention of the wife also to adopt the child, and the child cannot claim as the heir or next of kin of the wife under the decree of adoption by the husband.

A married woman could not in 1865 make a valid contract for the adoption of a child nor can the mother of a child, the father being living.

The measure of damages in this state for breach of a contract for adoption seems to be the value of the services rendered or outlay incurred by the promisee on the faith of the promise.

No. 95 June Term, 1906.

Opinion by OVER, J. Filed October 8, 1906.

Martha J. Carroll, a widow, died intestate February 1, 1905, leaving no issue to survive her, and Mrs. Louise C. Hemmick claims the whole estate either as an adopted child or under an alleged contract for her adoption.

It appears from the evidence that the claimant in 1865 when five years of age, was given by her mother to the decedent, and that her husband D. W. C. Carroll, in 1870, by proceedings in Common Pleas Court No. 2 of this county, in which both the claimant's father and mother joined was legally adopted as his child. That she was raised and educated by Carroll and his wife, recognized and introduced as their daughter, and lived with them until her marriage in 1881; that her children were recognized and treated by them as their grand-children, and after the death of Mr. Carroll in 1904, Mrs. Carroll introduced and treated the claimant as her daughter.

Although Mrs. Carroll was not a party to the adoption proceedings in the Common Pleas Court, yet it is contended that if the purpose was also to have the claimant adopted by her to which she assented, that such was the effect of the decree of adoption. *Peterson's Estate*, 212 Pa. 453, cited by counsel does not sustain this contention, as there the wife's purpose to also adopt the child was shown by her becoming a party to the proceedings by signing the petition, the prayer of which was for a decree that the child "have all the rights of a child and heir of the petitioners." There is no ambiguity in the petition or decree of adoption in this case. Parol evidence is inadmissible to show that it was the intention also to adopt the claimant as a child of Mrs. Carroll; the decree is conclusive and as under it she acquired only the rights of a child and heir of D. W. C. Carroll, she has no claim under it as a child of his wife.

The claimant's case as to the alleged contract of adoption rests on the testimony of three witnesses as to declarations of Mrs. Carroll and conversations between her and Mrs. Evans, the claimant's mother.

Mrs. Marshall, the claimant's aunt, testified that the arrangement between Mrs. Evans and Mrs. Carroll as to the child was that Mrs. Carroll "was to take her and adopt her as her own, make her her legal heir," and that she had a conversation with Mrs. Carroll in which she said "she was going to adopt her, that was before the adoption, quite a while after she had her, she had her quite a while before she adopted her, her father was very much worried about her and was going to take her away, said they would not keep her unless they did, they kept putting it off from time to time."

Mrs. Zugsworth, who was about fifteen years of age when the arrangement was made between Mrs. Carroll and Mrs. Evans, testifies that Mrs. Carroll "agreed with the mother there and then to take her only on those conditions, that she was to make her her legal and lawful heir, that is the only way she would let her have her."

Mrs. Taylor testifies that Mrs. Carroll told

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her after the adoption that "they had adopted Lulie on these provisions that her mother would give her up; she said it is a hard thing to ask a mother, but I told her she would either have to stay away or I could not keep Lulie, I want all her love; that they had adopted her as their own child."

Only two of these witnesses testified to the contract alleged to have been made about the time the child was given to Mrs. Carroll in 1865, one of them being only 15 years old at the time; and they must have remarkable memories if they can now, after the lapse of forty years, give the exact language used. The fact that Mrs. Carroll recognized the claimant as her daughter but slightly corroborates this testimony, as it was very natural to so speak of her when she was the legally adopted child of Mr. Carroll.

It appears that the claimant was not legally adopted by Carroll until some five years after she became a member of his household, and then only after the claimant's father insisted on such adoption, and as both he and her mother joined in that petition, they must have known that she was not adopted by Mrs. Carroll. We think then the presumption is that the terms of any agreement made between Mrs. Carroll and Mrs. Evans were fulfilled by this adoption, or that it was accepted in full performance thereof, and either presumption is a bar to Mrs. Hemmick's claim.

There are also two other reasons for rejecting it:

(1) If the alleged contract was made between Mrs. Carroll and Mrs. Evans, it was invalid because the claimant's father was not a party to it, and also because Mrs. Carroll was a married woman incompetent to make a valid contract: *Austin* v. *Davis*, 12 L. R. A. 120.

(2) Whilst in some states where there has been a breach of a contract for adoption, the child has been permitted to recover a child's share in the estate of the person contracting to adopt, the measure of damages in this state seems to be the value of the services rendered, or outlay incurred by the promisee on the faith of the promise: *Sandham* v. *Grounds*, 94 Fed. Rep. 83; *Kauss* v. *Rohner*, 172 Pa. 481; *Graham* v. *Graham Executors*, 34 Pa. 475.

And as there was no evidence offered in this case of any services rendered by the claimant except as to services rendered to Mr. Carroll, for which Mrs. Carroll's estate is not liable, there could be no recovery.

For accountant, *Thomas M. Benner.*

For exceptants, *Schoyer & Hunter.*

Court of Common Pleas No. 2,

ALLEGHENY COUNTY.

McKOWN & BEATTIE v. HARRIS

Mechanics lien—Act of June 4, 1901—Alteration and repairs by tenant—Lease—Liability of the owner.

On a rule taken by the owner to show cause why a mechanics lien should not be stricken from the record it appeared that the repairs for which the lien was filed were made by the tenant, whose lease provided that "the tenant to put in a new front at his own expense and leave the said improvement and all other improvements placed thereon by the tenant during the term upon the termination of this lease. Tenant is hereby given the privilege of building additions to the store-room on same terms as to leaving the same remain at the end of the term." Held, that under section second of the act of 1901 which provides as follows, "Nor shall any claim be valid against the estate of the owner by reason of any consent given by him to his tenant to improve the leased property, unless it shall appear in writing signed by such owner that said improvement was in fact made for his immediate use and benefit," the lien was not good as against the owner because not made for his immediate use and benefit, and the lien should be stricken from the record.

M. L. No. 45 April Term, 1906. Sur motion to strike off mechanics lien.

Opinion by YOUNG, J. Filed June 30, 1906.

This was a motion to strike off the mechanics lien filed in this case against the property of David Harris for materials furnished and work done for and about the addition, alteration and repair of a certain building therein described. Harris is the owner of the building, which he had leased to O. J. Gross Company as tenant for the

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term of five years at a rental of $6,000 for the term, the lease being dated January 1, 1906. The O. J. Gross Company, the tenant, contracted with the plaintiff for the labor and material set out in the lien, and the plaintiffs having filed the lien against Harris, the owner, now claim that it is a valid lien against the building under the second section of the mechanics lien act of June 4, 1901, P. L. 431, which provides as follows:

"Nor shall any claim be valid against the estate of the owner by reason of any consent given by him to his tenant to improve the leased property, unless it shall appear in writing signed by such owner that said improvement was in fact made for his immediate use and benefit."

It is claimed on the part of plaintiff that this clause of the lease, viz:

"Tenant to put in a new front at his own expense and leave the said improvement and all other improvements placed thereon by the tenant during the term upon the termination of this lease. Tenant is hereby given the privilege of building additions to the store-room on same terms as to leaving the same remain at the end of the term."

This shows the written consent of the owner to the improvements and that they were for the immediate use and benefit of the owner. The consent of the owner given to the tenant to improve the leased property does not of itself make the lien valid, and we must therefore look for a writing signed by the owner in which it shall appear "that said improvement was in fact made for his immediate use and benefit." Where do we find in the words of this lease more than a consent to the improvement? Where does it appear in this lease that the improvement was in fact made for the immediate use and benefit of the owner? It is true the owner consents to the improvement, but he only consents thereto upon certain conditions, first, that the tenant is to make the improvements consented to at his own expense, and second, that the improvements made are to be left by the tenant at the end of the lease. Nowhere does it appear that the owner signed a writing in which it appears that said improvements were for his immediate use and benefit. And this would be sufficient to warrant the striking down of the lien as to the owner.

This mechanics lien law was intended to be a complete law relating to mechanics' liens, and therefore we find in the second section provision for the written consent of the owner to the improvement, which is as it had been theretofore provided by the mechanics lien laws of 1861 and 1868. Therefore, while we have been referred to no cases under the present law, the cases of *McClintock* v. *Criswell*, 67 Pa. 183, and *Boteler* v. *Espen*, 99 Pa. 313, interpreting the "consent clause" of those two acts, are authority to guide us in the interpretation of the "consent clause" of the act of 1901. In the former of these cases it was said the consent to repair in the agreement was only upon condition of payment by the lessees and was not within the acts; and in the latter of these cases it was said that whether a clause in the lease authorizing the making of the alterations by the lessee constitutes such a written consent as to authorize the filing of a mechanics lien depends upon the question whether the cost of such alteration or improvement is to be borne by the lessor or lessee; if by the former, the consent is sufficient to authorize the filing of such a lien; if by the latter, it is not. In *McClintock* v. *Criswell*, *supra*, the repairs were to be made by the lessee at his own cost, and this was held sufficient to make the lien invalid against the owner. In *Boteler* v. *Espen*, *supra*, there was no provision as to the cost of the repairs, and yet in that case the court held that the terms of the lease indicated no intention that the expense of the repairs was to be borne by the lessor. In the case at bar the lease provides that the tenant is to make the improvements at his own expense.

Measured by the rule laid down in the two cases cited, the claim filed in this case is not a valid lien against the owner. Some other reasons were assigned why this lien was invalid, but the reason given above is sufficient to dispose of the case.

The rule to show cause must therefore be made absolute and the lien filed against David Harris, the owner in this case, must be stricken from the record.

For plaintiff, *Alvar C. Purdy.*

For defendants, *Thomas & Meals.*

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(Common Pleas No. 2, Allegheny Co.)

WILLIAMSON et al. v. McTIGHE.

Guarantor—Liability—Payment of toll—Penalty.

A contract provided that plaintiff should sell to X his output of cream which X was to pay for in a certain way under penalty of $100. A obtained judgment against X for the amount of the bill plus the $100 penalty. A then sued the guarantor of X under the contract. Held, that the guarantor was not responsible both for the bill and the penalty and therefore the judgment against X was not conclusive as to the guarantor.

No. 826 April Term, 1906. Sur rule for jubgment for want of sufficient affidavit of defense.

Opinion by SHAFER, J. Filed June 6, 1906.

This suit is upon a contract of guaranty made by Mrs. McTighe whereby she guaranteed the fulfillment of a certain contract on the part of Edward F. McCafferty. The contract mentioned is one between the plaintiffs and McCafferty to the effect that the parties of the first part will sell their entire output of sweet cream to McCafferty, which McCafferty agrees to pay for in a certain way. This contract was signed by the plaintiffs and not by the defendant, and after it is written the following: "We the parties of the second part do hereby guarantee our part of this contract under a forfeiture of $100. We herein set out hand and seal (Signed) Edward F. McCafferty." The affidavit of claim alleges that McCafferty purchased cream to a certain amount and paid on account thereof a certain amount, leaving a balance of $881.04 t;hat they brought suit against McCafferty and obtained a judgment against him for this amount together with $100 claimed to be forfeited in case of failure to comply with the contract, making a total with interest of $1005.57, and that they issued execution against McCafferty and were unable to collect any money whatever from him, and the plaintiffs now claim the amount of this judgment and costs against the defendant in the present case. The affidavit of defense alleges that the plaintiffs did not sell their whole output of sweet cream to McCafferty, but in violation of their agreement sold part of it to a dealer in the city of Allegheny, and sets up further that all that Mrs. McTighe was bound to do was to pay the penalty of $100 provided by the contract. Without now passing upon the question whether the defendant's liability on her guaranty is for all the cream which may at any time be sold to McCafferty under the contract, or only for the penalty of $100, it seems to us very evident that the plaintiff is not entitled to recover both of these upon the contract of guaranty, and his judgment against McCafferty is not conclusive upon the defendant in this case.

The rule is therefore discharged.

For plaintiffs, *Harvey A. Miller.*

For defendant, *L. S. Levin.*

PROPERTY. (EASEMENTS—PARTY WALLS) IOWA.

A decision which conforms to the principles which govern decisions concerning party walls, although the facts are a trifle peculiar, is contained in Jackson v. Bruns, 106 Northwestern Reporter, 1. It is there held that the owner of the second story of a building has no equitable right to compel the owner of the first story to keep the foundation and walls of the first story in repair for the purpose of furnishing continuing support to the second story in the absence of any express or implied contract on the part of the owner of the first story to do so. Cases concerning party walls including Sherred v. Cisco, 4 Sandf. 480; Partridge v. Gilbert, 15 N. Y. 601; Heartt v. Kruger, 24 N. E. 841; Hoffman v. Kuhn, 57 Miss. 746, and Odd Fellows Ass'n v. Hegle, 32 Pac. 679, are referred to and from them is deduced the rule that the owner of the second story does not have a perpetual easement, so as to be entitled to have the owner of the lower story replace the lower walls in case of total destruction, for the purpose of furnishing support to the upper story of the other party. From this the court argues that if no obligation exists to rebuild in case of destruction, one cannot be required to keep the foundations and walls in repair so as to support the upper story.—*The Green Bag.*

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PITTSBURGH, PA., OCTOBER 31, 1906.

Orphans' Court,

ALLEGHENY COUNTY.

In re Estate of MARGARETHA SIEGWARTH, Deceased.

Wills—Death of legatee—Time of payment—Discretion of executor as to payment—Widow of legatee—Right to legacy.

After several charitable bequests testatrix directed her executor to convert her estate into cash. She then bequeathed it in five equal shares to her children. As to the shares to her sons, Philip and William, she provided as follows: "I direct that the same be held by my executor, hereinafter named, in trust for my said sons, Philip Siegwarth and William Siegwarth, the income and clear annual profit arising from the interest or share hereby given, is to be paid to my said sons, but no part of the principal of said estate is to be given to my said sons for five years after my death and then only when in the judgment of my executor they shall have proven themselves to be entirely competent and qualified to take proper care of the same, at which time the said trustee shall pay the same over to my said sons, and in the event of the death of either of my said sons, without issue, then their share or shares shall revert back to my estate and shall go to and be divided among my remaining heirs." Testatrix died June 12, 1905, and her son Philip October 31, 1905, intestate and without issue but leaving to survive him a widow. Held,

First. That the devise is a separate, antecedent, substantative gift independent of the time of payment.

Second. The condition upon which the principal was to be paid having become impossible of performance by the death of Philip the legacy is a vested one and is presently payable.

Third. The provision that if he (Philip) "died without issue" means death in the lifetime of the testatrix and not an indefinite failure of issue.

Fourth. Philip's widow was entitled to payment of her deceased husband's legacy less funeral expenses and other expenditures advanced by executor of testatrix.

No. 149 September Term, 1906.

Opinion by MILLER, J. Filed October 5, 1906.

STATEMENT.

The question is, what estate did Philip Siegwarth, now deceased, take under his mother's will? in which after making several charitable bequests, she provided as follows:

"Fifth:—I do hereby order and direct my executor, hereinafter named, to sell all my real estate, at public or private sale, as he may deem best, and to execute good and lawful deeds or assuarance for the same, also to convert all the rest of my estate into cash, and after the payment of above bequests, I do give, devise and bequeath the same in five equal shares to the following named parties, viz: to the children of my deceased son, Charles F. Siegwarth, one share; unto my daughter Magdalena Werries (nee Siegwarth) one share; unto my daughter Sophia Liebler (nee Seigwarth) one share; unto my son Philip Siegwarth one share; and unto my son William Siegwarth the remaining share. In respect to the share, part or portion of my estate, given to my sons, Philip Siegwarth and William Siegwarth, I direct that the same be held by my executor, hereinafter named, in trust for my said sons, Philip Siegwarth and William Siegwarth, the income and clear annual profit arising from the interest or share hereby given, is to be paid to my said sons, Philip Siegwarth and William Siegwarth, but no part of the principal of said estate is to be given to my said sons, Philip Siegwarth and William Siegwarth, for five years after my death and then only when in the judgment of my executor, they shall have proven themselves to be entirely competent and qualified to take proper care of same, at which time the said trustee, shall pay the same over to my said sons, Philip Siegwarth and William Siegwarth, and in the event of the death of either of my said sons, Philip or William Siegwarth, without issue, then their share or shares shall revert back to my estate, and shall go to and be divided among my remaining heirs."

Testatrix died June 12, 1905; her son Philip died on the 31st day of October, 1905, intestate and without issue; but leaving to survive his widow, Annie Siegwarth, to whom letters of administration have been granted.

OPINION.

The will worked a conversion from the time of testatrix's death, and the entire estate so converted was devised absolutely in equal shares to the five children. This is an antecedent absolute gift, and by it Philip's share is a vested legacy, with the interest or income thereon to be paid to him for a period of five years, or longer, under certain conditions, subject to the discretion of the executor, who was appointed trustee for that purpose, with the payment of the principal postponed for said period. The direction as to Philip's share in the hands of the executor, as trustee, is a separate independent

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direction and concerns itself with the time of payment and the discretion which is conferred upon the executor.

The devise of the estate is a separate, antecedent, substantive gift, independent of the time of payment, and comes within the rule of *McClure's Appeal*, 72 Pa. 417, thus vesting the legacy absolutely in Philip.

The gift of the income during the five year period and indefinitely if the executor saw fit constitutes a gift of the fund itself; *Bruch's Estate*, 185 Pa. 197.

The direction to the executor to pay the principal only when in his judgment Philip proved himself to be entirely competent and qualified to take proper care of the same, in no wise effects testatrix's intention to give Philip the entire beneficial interest of this bequest; *Millard's Appeal*, 87 Pa. 457, where a similiar devise was made, and where it was held, as must be held here, that "the condition upon which the principal was to be paid having become impossible by the act of God," i. e. by the death of Philip, the legacy is a vested one and is presently payable.

That the reversion of Philip's share "if he died without issue" means death in the lifetime of the testatrix, is too clear to require citations from the beadroll of authorities; not only is this conclusion established from that well known rule of law, but it is in accord with testatrix's intention. She directed the payment of this legacy, subject to the executor's judgment at the end of five years. If this period had arrived and the executor had been satisfied of Philip's competency to accept the legacy and had paid it to him, is there any question that the legacy so paid was Philip's absolute property irrespective of the question of his having died without issue. If she had intended an indefinite failure of issue, or had intended that if Philip had no issue at the expiration of five years, or at any later period when the executor was ready to pay the principal that thereupon it would revert to her estate, she would have said so; and to have said so would have rendered meaningless her direction to the executor to pay at the end of the stipulated period.

The circumstances under which the executor paid Philip's funeral and other expenses were exceptional and should not be charged against him personally but should be treated as an advancement on account of his share. The approval filed by the heirs of age of this expenditure and the implied agreement that it should be proportionately charged against their respective shares is on the presumption that Philip's estate reverted to them; a contrary conclusion being reached this stipulation is not binding.

A decree will be entered awarding to the administratrix of Philip his share of this estate, less the personal expenses charged against him by the executor. Upon the filing by the administratrix of her account of this fund distribution thereof will be made according to the Intestate law.

For accountant, *Carney & Martin.*

For exceptants, *Mark Schmidt* and *W. A. Hudson.*

Court of Common Pleas,

DAUPHIN COUNTY.

Commonwealth, ex rel. Carson, Attorney-General v. Altoona and Philipsburg Connecting Railroad Co.

Railroads—Quo warranto—Incorporation of—Payment of ten per cent—Assignment of railroad to private individual—Illegal increase of stock—Act of 1887—Remedies.

The ten per centum cash payment required by law to be paid as a prerequisite to incorporation is demanded as an evidence of good faith in those seeking charters, and also as security for creditors and others who may have dealing with the newly chartered corporation.

The failure to pay the ten per centum in cash required by law previous to incorporation is sufficient ground for excluding the company from its franchise to be a corporation.

Without express authority of law a railroad company cannot assign or lease its property.

The defendant railroad company made over and delivered its railroad and everything else it had to a certain individual and permitted it to be further made over and delivered to another railroad company and ceased to do business. Held, that by such action the defendant railroad company substantially abdicated whatever franchises it had received from the commonwealth.

The remedy provided by section 4 of the act of 1887, to restrain and prevent the illegal issuance of bonds and stock by a railroad company, does not prevent the commonwealth from proceeding to oust a corporation of its franchise for misuse thereof.

No. 366 Commonwealth docket, 1904. Quo warranto.

Opinion by CAPP, J. Filed August 9, 1906.

This case was heard by agreement of the parties without a jury, under the provisions of the act of assembly approved April 22,

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1874. We find the facts to be as follows:

FINDINGS OF FACT.

1. Articles of association were filed in the office of the secretary of the commonwealth on July 11, 1892, by nine persons, all of whom claimed to be citizens of the state of Pennsylvania, asking to be incoporated under the name of Altoona and Philipsburg Connecting Railroad Company under the provisions of an act entitled "An act to authorize the formation and regulation of railroad corporations," approved April 4, 1868, and the acts supplementary thereto, for the purpose of constructing a railroad "beginning at or near the village of Janesville, in the county of Clearfield, thence northwardly to Houtzdale, in said county, thence northeastwardly to Philipsburg, in the county of Center, connecting at latter point with the Beech Creek Railroad and Pennsylvania Railroad," etc. The length of the proposed road, which was to extend through or into the counties of Clearfield and Center, was stated to be "as near as may be twenty miles." Attached to said articles of association and forming part thereof was an affidavit made by three of the subscribers that "five thousand dollars for every mile of railroad proposed to be made has been in good faith subscribed thereto and ten per centum paid thereon in good faith and in cash." On this application letters patent were duly issued by the governor, declaring the said Altoona and Philipsburg Connecting Railroad Company a body corporate and entitled to the franchises and privileges and subject to the provisions of the act of April 4, 1868, and since the date of said letters patent the defendant has been and now is acting as a corporation and exercising corporate powers and franchises.

2. The statement contained in the affidavit attached to and forming part of the articles of association of the Altoona and Philipsburg Connecting Railroad Company that "five thousand dollars for every mile of railroad proposed to be made has been in good faith subscribed thereto and ten per centum paid thereon in good faith and in cash," was false. The subscriptions were not made in good faith by any of the subscribers, and no cash had at that time, nor has any since, been paid thereon.

3 Under date of June 1, 1893, the Altoona and Philipsburg Connecting Railroad Company made, executed and delivered to the Union Trust Company, as trustee, a certain indenture of mortgage or deed of trust securing bonds to the amount of $325,000, which were issued by said company defendant. In response to a bill in equity filed by certain bondholders in the court of common pleas of Clearfield county to No. 5 September term, 1903, therein, the said company defendant, in its answer, signed and sworn to by its secretary, and filed by its counsel in March, 1904, said:

"That none of the holders of its bonds are innocent purchasers or purchased without knowledge of their invalidity, and said respondent further avers that all the bonds of the Altoona and Philipsburg Connecting Railroad Company are void under the provisions of the act of assembly of May 7, 1887, P. L. 94, Sec. 3 (Pepper & Lewis, e. 3915-3916, pl. 41), because at the time the mortgage was created on June 1, 1893, the Altoona and Philipsburg Connecting Railroad Company had no paid-up capital stock whatever, and has had none to the present time, and on June 1, 1893, the Altoona and Philipsburg Connecting Railroad Company owned no property whatever, and that even its first rights of way were not acquired until August, 1893."

4. The defendant company has issued a large amount of capital stock, to wit, $404,400, without receiving therefor any consideration whatever, and has issued bonds to the amount of $325,000, secured by its mortgage of June 1, 1893, to the Union Trust Company, as trustee.

5. The defendant company constructed a railroad from a point at or near Philipsburg to a place known as Ramey, stated in its answer to be thirteen miles in length and in the testimony "about fourteen miles," Ramey being about five miles distant from Janesville. The defendant never completed its railroad to Janesville, nor any further in that direction than Ramey, and avers in its answer that its failure to further construct and complete and open for use the remaining portion of the railroad authorized by its charter "was due to inability to secure moneys by sale of its stock or otherwise for the further construction of the road."

6. By written agreement under date of October 30, 1897, the defendant company (appearing as plaintiff's exhibit L and made part hereof as if recited at length) conveyed or attempted to convey to Samuel P. Langdon "or to the railroad company to whom this agreement may be assigned the privilege of the free use of its line to Philipsburg and accord to its mutual cooperation in the same for the unexpired time of its charter term," provided Langdon or his assignee should pay 60 per cent of the annual interest on $325,000 of bonds alleged to be then outstanding "which are secured by a mortgage on the

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line of the party of the first part," the defendant, "from Philipsburg to Ramey and make certain other payments therein mentioned." From the date of that agreement, October 30, 1897, defendant did not operate or render to the public any service whatever.

7. Under date of November 5, 1897, Samuel P. Langdon executed a written instrument, in which for "the sum of one dollar and other valuable considerations" he assigned to the Pittsburg, Johnstown, Ebensburg and Eastern Railroad Company, its successors and assigns, all his right, title interest, claim and demand in the aforesaid agreement of October 30, 1897, between the Altoona and Philipsburg Connecting Railroad Company and himself. The said Pittsburg, Johnstown, Ebensburg and Eastern Railroad Company thereupon took possession of the railroad previously constructed by defendant and operated it until August 1, 1903.

8. The Pittsburg, Johnstown, Ebensburg and Eastern Railroad Company itself constructed two and nine-tenths miles of railroad extending from Ramey in the direction of Janesville as far as Fernwood, said two and nine-tenths miles being not only upon the charter route of the Altoona and Philipsburg Connecting Railroad, but also upon the charter route of the Pittsburg, Johnstown, Ebensburg and Eastern Railroad Company, which last named company continued to operate the entire line (about seventeen miles in length) from a point at or near Philipsburg to near Fernwood until August 1, 1903.

9. On Aug. 1, 1903, a circular purporting to emanate from the office of the New York and Pittsburg Central Railroad Company, signed by its vice president and general manager, was issued, stating that "notice is hereby given that the above company having absorbed the Pittsburg, Johnstown, Ebensburg and Eastern Railroad Company, the said company hereby assumes possession of same with all property connected therewith. All employes of the Pittsburg, Johnstown, Ebensburg and Eastern Railroad Company will continue in the service of the New York and Pittsburg Central Railroad in the positions occupied by them until further notice." Since August 1, 1903, the Pittsburg, Johnstown, Ebensburg and Eastern Railroad Company, defendant, has not operated any railroad whatever.

10. The New York and Pittsburg Central Railroad Company, which on and after August 1, 1903, operated the thirteen or fourteen miles of railroad built by defendant company to Ramey, and the short railroad from Ramey to Fernwood, built by the Pittsburg, Johnstown, Ebensburg and Eastern Railroad Company, is not a corporation and no authority has been shown for its operation of a railroad or for the lease, assignment or conveyance to it of the railroad of any common carrier. The New York and Pittsburg Central Railroad Company consisted chiefly of Mr. Langdon, who, according to the testimony of its former vice president and general manager, "seemed to be running the whole business."

11. The defendant company has, for a number of years, refused or neglected to make to the proper department of the state government the reports required by law as bases of taxation and for statistical and other purposes, has failed to pay any state taxes, and the state officers have found it impossible to collect taxes from it.

12. Under date of March 3, 1906, a final decree was filed by the court of common pleas, Clearfield county, sitting in equity, in proceedings wherein the Union Trust Company et al. were plaintiffs and the Altoona and Philipsburg Connecting Railroad Company was defendant, by which decree the Union Trust Company, trustee of the mortgage aforesaid, was authorized to expose defendant's railroad to public sale in default of payment of the bonds being made on May 1, 1906. No evidence has been submitted to this court showing payment of the said bonds or any of them.

DISCUSSION.

This case requires us to decide whether on the facts hereinbefore found the commonwealth is entitled to a judgment of ouster. The above finding of facts involve the same legal propositions which were determined by this court in a quo warranto proceeding instituted by the Com. ex rel. Hampton L. Carson, attorney-general, v. Pittsburg, Johnstown, Ebensburg and Eastern Railroad Company, in the court of common pleas of Dauphin county, No. 365 commonwealth docket, 1904, which case, by agreement of counsel, was tried and argued with this proceeding (32 Pa. C. C. R. 401). We feel that nothing can be added to what we said in that proceeding and will content ourselves with reiterating the reasons assigned for the conclusion of law reached in that case, with such slight additions and modifications as may be required to make the same applicable hereto.

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The act of April 4, 1868, P. L. 62, entitled "An act to authorize the formation and regulation of railroad corporations," under which defendant claims to be incorporated, inter alia, provides:

"Section 2. Such articles of association shall not be filed and recorded in the office of the secretary of the commonwealth until at least nine thousand dollars of stock for every mile of railroad proposed to be made is subscribed thereto, and ten per centum paid thereon in good faith and in cash to the directors named in said articles of association, nor until there is endorsed thereon or annexed thereto an affidavit, made by at least three of the directors named in said articles, that the amount of stock required by this section has been in good faith subscribed and ten per centum paid in cash thereon as aforesaid, and that it is intended in good faith to construct or to maintain and operate the road mentioned in such articles of association; which affidavit shall be recorded with the articles of association as aforesaid."

The supplementary act approved June 8, A. D. 1874, P. L. 277, inter alia, provides:

"Section 1. Be it enacted, etc., That from and after the passage of this act, articles of association authorized by an act, entitled "An act to authorize the formation and regulation of railroad corporations," approved April fourth, Anno Domini one thousand eight hundred and sixty-eight, may be filed and recorded in the office of the secretary of the commonwealth, when five thousand dollars of stock for every mile of railroad proposed to be made is subscribed, and ten per centum paid thereon, in good faith, in cash, to the directors named in said articles of association."

The ten per centum cash payment required by law to be paid as a prerequisite to incorporation is undoubtedly demanded as an evidence of good faith in those seeking charters and also as security for creditors and others who may have dealings with the newly chartered corporation. The defendant company obtained its charter without such cash payment having been made, as is set forth in the affidavit attached to and forming part of the articles of association, and therefore obtained it by fraud and deception. In *Com.* v. *Gray's Mineral Fountain Co.*, 8 Dau. Co. Rep. 45 (44 L. I. 118) this court, McPherson, J., held that this payment of the ten per centum is a condition precedent to incorporation, and if not fulfilled and the state is deceived in reference thereto, the charter obtained by such deception, whether it be fraudulent or merely the result of a mistake, "is only a charter de facto and is voidable at the suit of the attorney-general." The learned judge further says: "A definite cash capital must be at once available for corporate business and the public must not be deceived," and accordingly held that the failure to pay the ten per centum in cash required by law previous to incorporation was sufficient ground for excluding the company from its franchise to be a corporation, and that the proceeding in quo warranto was properly brought against the company itself and that the commonweath was entitled to judgment of ouster thereon.

Section 5 of the act of April 4, 1868, inter alia, provides that "the company shall commence the proposed road, if not more than fifty miles in length, with at least one track, within two years from their organization as aforesaid, and prosecute the work on the same with due diligence, and open and complete the same within five years:" and the second section of the supplementary act of June 4, 1875, allows "each company organized under said act one year to complete their road for each twenty-five miles more than the fifty miles required to be finished within two years." Although the charter of the defendant company called for twenty miles of railroad, it does not claim to have constructed more than thirteen or fourteen miles, nor either commenced or seriously contemplated the construction of any other railroad whatever.

The defendant company for a time operated about fourteen miles of railroad constructed by it, but subsequently assigned it to a natural person, whose right either to hold or operate or assign the said railroad cannot be sustained. On August 1, 1903, in some way not clearly explained, the road was made over and delivered into possession of the so-called New York and Pittsburg Central Railroad Company, an unincorporated association having no authority whatever to operate a railroad constructed by a chartered common carrier and made by the Constitution a public highway. Without express authority of law a railroad company cannot assign or lease its property and no authority has been shown for such assignment or lease to any save a regularly chartered railroad company. *Stewart's Ap.*, 56 Pa. 415; *Jessup* v. *Loucks*, 35 Pa. 50.

"The statutes of Pennsylvania conferring leasing powers on railroads are limited to railroad companies created by or existing under the laws of Pennsylvania, giving them leasing rights with foreign or domestic railroads, provided that they shall be connected with each other directly, or by intervening railroads.

A railroad lease made without clear and specific authority is against public policy and utterly void, and the liability of the lessor is entirely unaffected by the void

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lease." *Van Steuben* v. *Central R. R. Co. of N. J.*, 178 Pa. 367.

"It may further be assumed, at least as a speculative conclusion, that a francise of such a nature that it cannot be supposed that the legislature would have conferred it upon an individual in the first instance, cannot, without the assent of the legislature, be transferred by a corporation to an individual and become vested in him by a purchase under a judicial sale." 4 *Thompson's Com. on the Law of Corp.* Sec. 5368.

"No corporation can, without the distinct permission of the state, alien any property necessary to the possession and enjoyment of its inalienable franchises—that is to say, such property as is necessary, either (1) to the exercise of its franchise to be a corporation, or (2) to the discharge of the public duties in consideration of which its franchises have been granted." Ib, Sec. 5373. See also Secs. 5355 and 5356.

"While the abandonment and non-user by the corporation of its franchise will or will not work an ipso facto dissolution, according to the nature of the rights involved in the question, and the manner in which it arises—yet it is well settled that, whenever a corporation voluntarily and totally abandons the exercise of its franchises, and does or suffers to be done, acts which destroy the end and objects for which it was incorporated, this will authorize a judgment ousting it of its franchises at the suit of the state." 5 Thompson, Sec. 6618.

"It may be affirmed as a general principle, that where there has been a misuser, or a non-user, in regard to matters which are of the essence of the contract between the corporation and the state, the acts or omissions complained of have been repeated and willful, they constitute a just ground of forfeiture." *Com.* v. *Commercial Bank of Pa.* 28 Pa. 379.

The act entitled, "An act to enforce against railroad corporations the provisions of Art. 16, Sec. 7, Constitution," approved May 7, 1887, P. L. 94, provides in section 1 that no railroad corporation "shall authorize or make any issue of its capital stock for money for a a less amount than the full par value of each share of its stock, which par value in money shall be actually paid into the treasury of such corporation before the issue of any full paid certificate for such shares of stock," and section 2 provides no stock shall be issued for labor done or property received until after a sworn statement has been filed in the office of the secretary of the commonwealth, showing that the prices paid or contracted to be paid for such labor or property were not in excess of the prices for which at the time they could have been obtained for money paid. The defendant violated both of these salutary provisions by issuing $404,400 of capital stock for no consideration whatever and $325,000 of bonds with no paid-up capital to sustain or justify them. It is true that section 4 of the act of 1887 provides that upon complaint duly made to the attorney-general he shall proceed to enforce the provisions of the act and restrain and prevent consummation or continuance of illegal acts thereunder, but the remedy thus provided in our opinion does not prevent the commonwealth from proceeding to oust a corporation of its franchise for misuser thereof by violating express and important provisions of statute law pertaining thereto, and the remedy of the commonwealth by quo warranto is not interfered with but remains nevertheless. *Birmingham and Elizabeth Turnpike Road* v. *Com.*, 1 Pennypacker, 458; *Com.* v. *Towanda Water Works*, 1 Monaghan, 500; *Com.* v. *Potter County Water Works Co.*, 212 Pa. 463. And see 5 Thompson, Secs. 6620 and 6641.

It may be noted that the act of 1887 visits no penalty upon the corporation for violation of its provisions, although it does provide penalties for officers of such corporations who knowingly assent to the violation of its terms.

When the defendant made over its railroad and everything else it had to Samuel P. Langdon and permitted it to be further made over to the so-called New York and Pittsburg Central Railroad Company and ceased to do business, it substantially abdicated whatever franchises it received from the commonwealth.

CONCLUSIONS OF LAW.

Upon the whole we therefore hold that the commonwealth is entitled to judgment that the defendant be ousted and altogether excluded from the franchise to be a corporation under the name of Altoona and Philipsburg Connecting Railroad Company, and that the commonwealth recover its costs from the defendant. The prothonotary is directed to enter this judgment against the defendant unless exceptions be filed within the time limited by law.

Note—See rule to intervene in this proceeding, Com. ex rel. Carson, attorney-general, v. Altoona & Philipsburg Connecting Railroad Co., 31 Pa. C. C. R. 646.

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PITTSBURGH, PA., NOVEMBER 7, 1906.

Orphans' Court,

ALLEGHENY COUNTY.

In re Estate of HARIET A. BROWN, Deceased.

Wills—Residuary legatee—Codicil—Construction of.

Testatrix, after describing certain real estate owned by her, directed her executor to sell the same at public sale. Then, after providing for the payment of her debts and funeral expenses, she directed the remaining proceeds of the sale of the real estate to be divided among various persons with a final provision that "all the rest and residue of the proceeds of said sales of all my real estate I give and bequeath to the First Methodist Episcopal Church of Braddock, Pennsylvania." By codicil made at the same time she provided, "I give and bequeath to Irene Adams, above named, all my household furniture and other personal effects." At the time of her death testatrix had money in bank, jewelry and household effects. Held, that the debts and funeral expenses were to be paid from the proceeds of the sales of the real estate, the remaining proceeds of which were to go to the parties named, after which the residuary legatee took the balance from such sales, and that Irene Adams by the codicil was entitled to the money in bank and jewelry as well as the household goods.

The will showed an intention to limit the residuary legatee to what was left of the proceeds of the real estate and therefore the residuary legatee had no interest in the property devised by codicil.

Opinion by MILLER, J. Filed October 19, 1906.

No. 63 September Term, 1906. Sur claims of Irene Adams and the First Methodist Episcopal Church of Braddock, residuary legatees.

STATEMENT.

The questions are, does the codicil devising the household furniture and other personal effects carry,

(a) Jewelry; and

(b) Money in bank, not otherwise dispesed of?

Testatrtx by her will, dated May 10, 1897, first directed that all her debts and funeral expenses be paid; then "as to such estate as it has pleased God to entrust me with *which consists of the following named pieces of property*," specifically describing twelve or more separate and distinct lots of ground with improvements thereon, which she directed her executor to sell as soon as convenient by public auction or sale; she then directed that after all her debts, funeral expenses and tombstone were paid "the remaining proceeds of the sale of the above mentioned properties be disposed of as follows:" one-fifth to her brother; one-tenth to her niece, Irene Adams, when she arrives at the age of twenty-one years, and in case of her death before that time to the First Methodist Episcopal Church of Braddock; one thousand dollars to Roe Safford, with the same limitations and upon the same conditions; one thousand dollars to Fanny N. Findlay, if she be living at the time of her decease, and finally, "all the rest and residue of the proceeds of said sales of all my estate [both] real [and personal] I give and bequeath to the First Methodist Episcopal Church of Braddock, Pennsylvania;" the words "both" before "and personal" after "real" are crossed out.

At the same time and in presence of the same subscribing witnesses she made the following codicil to her will, "I give and bequeath to Irene Adams above named all my household furniture and other personal effects." At the time of her death, April 19, 1904, as appears from the inventory filed she had cash in bank $1,378.96, jewelry inventoried at $620.50 and household goods and clothing inventoried at $109.85. Her debts, funeral expenses and the cost of a tombstone exceeded the value of the above named personal property; the household goods were delivered to the legatee under the codicil; the jewelry is on hand.

For Irene Adams it is claimed that under the codicil the jewelry and cash in bank should be awarded to her, and the debts

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funeral expenses and cost of tombstone be charged against the proceeds of the sale of the real estate; while for the First Methodist Episcopal Church, the residuary legatee under the will, it is claimed that the jewelry and cash in bank can not be awarded to the claimant under the codicil, but that the residuary legatee under the will takes it all.

OPINION.

The real estate, household furniture and personal effects are the only property or estate distinctly mentioned and specifically devised; the first is the sole subject disposed of by will, while the codicil relates only to personal effects and household furniture. That the debts, funeral expenses and the costs of a tombstone were to be charged to, and paid from, the sales of the real estate is manifest from the explicit direction that "the remaining proceeds of the sales of the real estate before described" shall go to the parties named, after which the residuary legatee takes only the rest and residue of the proceeds of the sales of the real estate remaining.

That the testatrix had in mind both personal and real estate when her will was written is apparent from the fact that reference to the personal estate was stricken from the will, presumably before execution, leaving the residuary devisee a beneficiary only in the rest and residue of the estate "real;" this clearly shows her intention to limit her bounty to this residuary legatee in what was left of the proceeds of the sales of the real estate; it follows therefore that the residuary legatee under the will has no interest in the property devised by the codicil.

In *Reimer's Estate*, 159 Pa. 212, after a devise to the testator's brother of certain specified personal property the direction was that "the balance of the personal effects be divided among the children of my sister, Mary Ewing," it was held that this sentence was residuary in character and carried with it more than twenty-three thousand dollars of cash and securities.

Here the codicil must be held residuary in character as to all the estate not otherwise disposed of, and certainly carries the jewelry, which is one of the subjects of dispute.

"Jewels or jewelry are articles of personal adornment as gems, in the setting of precious metals, or in pieces of jewelry work, or a trinket, or ornament worn on the person as a ring and bracelet or a brooch," *Century Dictionary;* they are articles associated with the person, *Lippincott's Estate*, 173 Pa. 371; whether this testatrix ever wore the particular jewelry or used it for her own personal adornment is immaterial. If jewelry is not within the class of personal effects it is difficult to imagine what else should come within that category under this will.

It is not to be presumed that testatrix intended to die intestate as to any portion of her estate; it is clear that she had in contemplation in the will only her real estate; this is emphasized by her striking out the words relating to personal estate. Her evident purpose in making the codicil was to dispose therein of what had been left out of the will. To hold otherwise is to conclude that intestacy has resulted under this will and codicil, a construction which is always avoided unless the contrary be unavoidable: *Board of Missions Appeal*, 91 Pa. 507; *Hofius* v. *Hofius*, 92 Pa. 305.

This conclusion is in accord with *Reimer's Appeal*, *supra*, and not in conflict with *Lippincott's Estate*, *supra*. In the latter the devise was of "jewelry, wearing apparel and personal effects, except such of the same as are hereinbefore otherwise disposed of;" under this clause a legatee claimed the furniture, pictures and all other personal property in the house; but it appears that there were other bequests of specific personal effects, and there was a residuary devise over. The case is distinguished from *Reimer's Appeal*, as is pointed out by the court below and affirmed on appeal.

Nor is this in conflict with *Dox's Estate*, 30 Sup. Ct. 393, where a devise of wearing apparel to a friend was held not to include jewelry; there "the claimants were neither heirs or next of kin * * * the residuary legatees are of her next kin and are given the rest, residue and remainder of her estate of whatever nature and wheresoever situate, and they are intended to have everything not theretofore specifically devised."

There is no doubt that if there were any other clauses carrying the personal estate under this will that under both *Lippincott's Estate* and *Dox's Appeal* above recited, the

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words "personal effects" would not carry either the jewelry, or the cash, taken in connection with the previous restricted devise of household furniture. This case, however, turns "upon the need of avoiding an intestacy," as is said in *Lippincott's Estate*, and differs in that respect therefrom.

The residuary clause in *Jacob's Estate*, 140 Pa. 268, devising the remainder and residue of money, carried real estate not otherwise disposed of. The same rule is held in *Sweitzer's Estate*, 142 Pa. 541. Personal effects here should be given a similar broad construction, otherwise this niece takes nothing and intestacy is the result.

It follows that if the debts, funeral expenses and tombstone were to be paid from the proceeds of the sales of the real estate, that the testatrix relieved the personal estate therefrom: *Hulton's Appeal*, 104 Pa. 359; not only is this intention expressly declared, but it appears by necessary implication: *Eavenson's Appeal*, 84 Pa. 172, for if she had intended that her personal estate should first be exhausted, it being less than her debts, the specific bequests of the same, or of any part thereof, would have been useless, and it can not be presumed that testatrix intended the gift of other personal effects to be of no value.

For accountant, *E. J. Smail.*

For guardian, *F S. Bennett.*

For First Methodist Episcopal Church, *William Yost.*

For commonwealth, *A. S. Miller.*

Court of Common Pleas No. 2,

ALLEGHENY COUNTY.

SCOTT v. STONE et al.

Replevin—Bond—Act of April 19, 1901.

The Act of April 19, 1901, applies to all actions of replevin, and plaintiff must give a bond in accordance with that act and not the act of March 21, 1772.

No. 429 July Term, 1906. Sur rule to show cause.

Opinion by YOUNG, J. Filed June 27, 1906.

This was a rule to show cause why the writ of replevin issued in this case should not be quashed. The principal reason alleged is that the plaintiff failed to file a bond as provided by the act of March 21, 1772, 1st Smith's Laws 370, section 11. Under the authority of *Drumgoole* v. *Lyle*, 30 Pa. Sup. Ct. 463, Advance Reports, June 15, 1906, we are constrained to hold that the act of April 19, 1901, P. L. 88, was intended to cover all actions of replevin. In that case Judge Henderson says:

"The act of April 19, 1901, P. L. 88, does not except from its operation any action of replevin distinguishable from others because of the particular facts out of which it arises. None of its sections suggests a substantial implication that it was not intended to apply to writs issued by tenants against landlords in cases of seizure for rent. The title; the provisions for giving a bond before the writ goes out; for the service; for the admission of intervening parties; for the filing of a declaration under oath and an affidavit of defense clearly indicate that the statute was intended to provide a convenient practice under which the rights of all parties interested in the property might be worked out."

The bond in the case at bar having been given in accordance with that act must be held to have been properly given, and we must therefore decline to quash the writ.

The rule to show cause will therefore be discharged.

For plaintiff, *James Fitzsimmons.*

For defendants, *Reed, Smith, Shaw & Beal.*

Court of Common Pleas,

DAUPHIN COUNTY.

Commonwealth, ex rel. Carson, Attorney-General v. Beaver Valley Railroad Company.

Railroads—Rights to occupy street—Act of 1868

A company organized under the general statute may locate its railroad on a street or alley; the statute expressly confers the power.

The municipal authority of the B borough granted the B. V. R. R. Co. the right to lay its railroad on Fifth street longitudinally. The construction cost $130,000, and the road was being actively operated. Several abutting property owners, through the suggestion of the attorney-general, sought to restrain the company from operating

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its road and sought to remove the road as a nuisance. Held, that the railroad company had a lawful right to construct and operate the road.

A highway is the property of the public, not of a particular district, but of the whole State; and the fact that the legislature of 1791 provided that the street in question, among others, should be a common highway forever cannct lessen the control of the State.

No. 306 Commonwealth docket, 1905. Bill for injunction.

Opinion by CAPP, J. Filed July 16, 1906.

This proceeding was instituted by the commonwealth of Pennsylvania, ex rel. Hampton L. Carson, attorney-general, against the Beaver Valley Railroad Company to restrain the defendant company from operating and maintaining its railroad longitudinally on Fifth street in the borough of Beaver, to have the said railroad declared a public nuisance, to require the removal of said construction from Fifth street and restore the street to the condition it was prior to the entry thereon by the said defendant company and its occupation thereon.

From the admissions in the answer and the evidence taken on final hearing, we find the facts to be as follows:

FINDING OF FACTS.

1. The town of Beaver was laid out in pursuance of two several acts of assembly, approved respectively September 28, 1791, III Smith's Laws 56, and March 6, 1793, III Smith's Laws 90, in which it is, inter alia, provided "that the Governor shall reserve out of the lots of the said town so much land as he shall deem necessary for public uses," and also, "that the streets, lanes and alleys of the said town and out lots shall be common highways forever," and was incorporated into a borough by the act of assembly approved March 29, 1802, III Smith's Laws 495.

2. The defendant company was incorporated September 5, 1899, under the act of April 4, 1868, entitled "An act to authorize the formation and regulation of railroad corporations," and the several supplements thereto, for the purpose of constructing, maintaining and operating a railroad between two points in Beaver county, Pennsylvania, "the eastern terminus being at or near the point where the Beaver and Mercer State road, commonly called the Sharon road, crosses the Pittsburgh and Lake Erie Railroad in Beaver county, Pennsylvania, and the western terminus at or near a point on the Ohio river, about five hundred feet south of the residence of John Moore, in Borough township, in said county and state."

3. The municipal authorities of the borough of Beaver, by ordinance duly approved September 15, 1899, granted the defendant company the right to enter upon Fifth street, in the borough of Beaver, Pennsylvania, and to construct, maintain and operate its railroad thereon longitudinally, which said ordinance was accepted by the defendant company on the 20th day of September, 1899.

4. The defendant company, subsequent to the enactment and acceptance of said ordinance, located and constructed its railroad through the borough of Beaver, along and upon Fifth street, one of the "common highways" of said borough (laid out and dedicated in pursuance of the provisions of the act of 1791, supra) longitudinally, in the center of said street, to wit, a distance of about three thousand, eight hundred feet, which said street intersected and crossed by several streets, viz., Buffalo street, Market street, Elk street, Branchbank street, Beaver street and Mercer road, upon which several streets or roads as well as upon Fifth street, there is comparatively little travel.

5. The construction of the said railroad on Fifth street was commenced in the latter part of October, 1903, and completed about June 1, 1904, since which time it has been in active operation. In the construction of its railroad the defendant company expended about the sum of $130,000.

6. Between the date of the commencement of the construction of the railroad and the date of its completion the borough of Beaver and several abutting property owners filed injunction bills to restrain its construction on Fifth street, which several proceedings were duly dismissed; and on September 25, 1905, the present bill was filed.

DISCUSSION.

The question to be determined in this case is: Has the Beaver Valley Railroad Company, a corporation duly incorporated under

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the act of assembly approved April 4, 1868, the right to occupy Fifth street, in the borough of Beaver, longitudinally with its railroad as constructed and for some time permission so to do.

It is not disputed that the railroad company is occupying Fifth street with the consent of the borough authorities and in accordance with terms of the ordinance granting it permission so to do.

It cannot be questioned, under the numerous decisions of our appellate courts, that a highway is the property of the public, not of a particular district, but of the whole state, who may dispose of it by their representatives and at their pleasure, and in which no person, natural or corporate, has an exclusive interest unless it has been granted by the statute. *Philadelphia* v. *Trenton R. R. Co.*, 6 Whart. 25.

The right of the supreme legislative authority to authorize the building of a railroad on a street or other public highway is not to be doubted. *Com.* v. *Erie and Northeastern R. R. Co.*, 27 Pa. 339.

The power of the legislature to authorize the building of a railroad upon a public road is indubitable . . . To the commonwealth belongs the franchise of every highway within its limits as trustee of the public. Every public road therein exists by force only of the commonwealth's authority. *Danville, etc., R. R. Co.* v. *Com.*, 73 Pa. 29.

The principle of law supported by the above authorities is not denied, but it is suggested that Fifth street is peculiar in its relation to the commonwealth, in view of the fact that it was dedicated as a "common highway" under and in pursuance of the act of 1791, supra. We fail to see how this fact can in any wise interfere with the operation of the admitted general principle of law that the sovereignty of public roads remains in the commonwealth; the fact that the commonwealth has dedicated the street in question to public use does not lessen its control over it, or prevent it from exercising the same sovereignty it admittedly would have if the street had been dedicated by some one else; we can see no force in this suggestion.

The rights of railroad companies incorporated and organized under the provisions of the act of April 4, 1868, to occupy public highways longitudinally have been so well settled by our appellate courts that any attempt on our part to discuss this right would be an affectation of learning and research.

In the appeal of the *Philadelphia, Germantown and Norristown Railroad Company*, 3 Walker 291, a proceeding in equity brought to restrain a railroad company, formed by the consolidation of several companies incorporated and organized under the general railroad laws of this commonwealth, from laying its track upon Lafayette street, in the borough of Norristown, longitudinally, the president judge of the court below, on a motion to continue the injunction, dissolved it, referred the case to a master, who submitted a report thereon, in which he adopted the views expressed by the court in its refusal to grant the preliminary injunction, which report, upon exceptions, was duly confirmed, whereupon the complainant appealed to the Supreme Court, who affirmed the decree of the court of common pleas in the following per curiam opinion:

"The sole contention is as to the right of the appellee to construct its road on Lafayette street in the borough of Norristown. The appellants own lots fronting on the street. They have no greater right than any private person owing a lot fronting thereon has to prevent the construction of the railroad. No question as to the measure of damages, or giving security for the payment thereof arises. They are out of the question. The municipal authorties have given their permission to lay the track on the street. It is in the line of the corporate franchise of the appelee. Under these facts, the right to lay it is too well sustained by the authorities to be successfully questioned."

Mr. Justice Trunkey, in *Penna. R. R. Co's Appeal.*, 115 Pa. 514, says: "A company organized under the general statute may locate its railroad on a street or alley, because that statute expressly confers the power." The commonwealth suggests that this language of the learned justice is *obiter dicta* and was not well considered. To this suggestion we cannot accede; on the contrary, when it is noted that the opinion in *Penna. R. R. Co.'s Appeal* was filed little more than a year subsequent to the per curiam hereinbefore recited, it is very evident this statement was

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incorporated in the opinion by the learned justice with the disposition of the Philadelphia. Germantown and Norristown R. R. Co.'s Appeal, supra, fresh in his recollection.

This construction of the act of April 4, 1868, was also adopted by the master in *Phila.* v. *River Front R. R. Co.*, 173 Pa. 334, exceptions to whose report were overruled by the court of common pleas, and upon appeal the Supreme Court affirmed the judgment of the court below by a per curiam opinion saying: "The questions involved in the assignments of error, so far as are material, have been so fully considered by the learned master that we deem it unnecessary to add anything to what he has said."

See also *Penna. R. R. Co.'s Ap.*, 116 Pa. 55; *McAboy's Ap* , 107 Pa. 548.

The defendant also contended that even if the commonwealth had any standing to proceed in equity, nevertheless by remaining qiet uuntil defendant had expended a large sum of money in the construction of its rail road, in pursuance of authority contained or believed to be contained in his charter and the general laws pertaining thereto, and until said railroad was fully completed and had been for some time in operation, the commonwealth waived and by its laches lost its right to proceed in equity.

The defendant company commenced work on the construction of its railroad on Fifth street in October, 1903. It was temporarily stopped by injunction, subsequently dissolved, after which the work on the railroad was resumed and completed about June 1, 1904. This bill was filed Sept. 25, 1905, more than fifteen months after the completion of the road and the commencement of its operation. The defendant expended a large amount of money in the construction of its road, and there is no evidence that the presence of the track in the centre of Fifth street, which is one hundred feet wide, is a public menace, nor that it is a nuisance. There is some force in this position of the defendant. See *Com.* v. *Turnpike Co.*, 153 Pa. 47; *Com* v. *Pittston Ferry Bridge Co.*, 148 Pa. 621; *Heilman* v. *Street Rwy. Co.*, 175 Pa. 188; *Heilman* v. *Street Rwy. Co.*, 180 Pa. 627. But in view of the well settled right of the defendant to construct and operate its railroad on Fifth street, as it has done, it is unnecessary for us to pass upon the question of laches raised by the defendant.

CONCLUSIONS OF LAW.

Wherefore we conclude that the defendant had the lawful right to construct and operate its road longitudinally on Fifth street in the borough of Beaver, and that the plaintifi's bill must be dismissed.

And now, July 10, 1906, this cause came on to be heard on final hearing, was argued by counsel, and upon consideration thereof it is ordered, adjudged and decreed that the plaintiff's bill be dismissed at its costs. The prothonotary is directed to enter this decree nisi and give notice thereof to the parties or their counsel, and unless exceptions be filed within the time limited by the equity rules enter the above decree as a final decree.

For plaintiff, *H. L. Carson, J. C. Cox* and *A. C. Johnston.*

For defendant, *Olmstead & Stamm.*

(From Paul A. Kunkel, Esq., Harrisburg, Pa.)

The doctrine of assumed risk is held, in B. Shoninger Co. v. Mann (Ill.) 3 L. R. A. (N. S.) 1097, not applicable to relieve a landlord from liability to a tenant's employe for injuries caused by the unsafe condition of a common passageway.

Trading stamps are, it is held in O'Keefe v, city of Sommerville. 76 Northeastern Reporter, 457, not goods, wares, merchandise or commodities within the Massachuettes constitution authorizing the legislature to impose reasonable duties and excises upon any of the article mentioned.

A mere allegation that plaintiffs were not guilty of an offense for which a criminal prosecution was threatened wus held in Sullivan v. San Francisco Gas and Electric Co,. 83 Pacific Reporter, 156, not to be sufficient to authorize the issuance of an injunction to restrain the contemplated prosecution. Injunctive relief will in proper cases be afforded where it is attempted to enforce an iuvalid law or ordinance, but a person fearing unjust prosecution under a valid enactment has no right to substitute a court of equity for a criminal court in passing upon the question of his guilt.

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PITTSBURGH, PA., NOVEMBER 14, 1906.

In Memoriam.

FREDERICK HILL COLLIER.

A meeting of the members of the Allegheny County Bar was held at the rooms of the Bar Association on Friday, November 2, 1906, to take suitable action on the death of HON. FREDERICK HILL COLLIER.

President—Hon. Marshall Brown.

Vice Presidents—Hon. Wm. P. Potter, Hon. W. D. Porter, Hon. Wm. G. Hawkins, Hon. John M. Kennedy, Hon. Robert S. Frazer, Hon. Joseph Buffington, A. M. Brown, Esq., D. D. Bruce, Esq., T. C. Lazear, Esq., Hon. Christopher Magee, Sol Schover, Esq.

Committee on Resolutions—D. T. Watson, Esq., Hon. E. H. Stowe, Hon. J. W. Over. W. B. Rodgers, Esq., Levi Bird Duff, Esq., A. B. Hay, Esq.

Secretaries—Robert E. Stewart, Esq., Wm. B. Pearsall, Esq., M. W. Acheson, Esq.

The Committee on Resolutions reported the following minute, which was unanimously adopted:

Mr. Chairman and Gentlemen of the Bar:

FREDERICK HILL COLLIER was born in Lancaster county, Pa., on February 25, 1826. On October 30, 1906, he died at his residence in Sharpsburg, Allegheny county, Pa., aged 80 years, 8 months and 4 days.

He was educated in the common schools of Pennsylvania and at Brookville Academy, near Washington, D. C., and at Columbian College, in the last named city, from which he graduated in the class of 1849. Eager for the conflicts of the bar he studied law in the city of Washington and was admitted to that bar in 1850. On January 11, 1851, he was admitted to practice law in the courts of Allegheny county, and in 1856 he was elected district attorney for Allegheny county and served for three years as such.

During the Civil War he organized and was appointed colonel of the One Hundred and Thirty-ninth Pennsylvania Infantry of Volunteers, and was brevetted brigadier general of volunteers for gallant service at Gettysburg. This regiment he organized in 1862, after the second Bull Run disaster, and, hurrying to the front, it was made part of the third division of the Sixth army corps. With its colonel it took part in the battles of Gettysburg, Antietam, Rappahannock Station, Spottsylvania Court House, Cold Harbor, Petersburg and Richmond. In the year 1863 the Judge was detailed by the President and Secretary of War to preside over courts martial, and in this way he renewed an intimacy begun in Pittsburgh with the great war secretary, Edwin M. Stanton, and also frequently came in contact with that great leader of men, Abraham Lincoln.

After the war was over and General Lee had surrendered to General Grant at Appomatox, Judge Collier returned to the city of Pittsburgh and began the practice of law, entering the firm then known as Miller & McBride, which thereafter was known as the firm of Collier, Miller & McBride. He continued the practice of law as a member of that firm until the year 1869, when he was elected judge of the common pleas court of Allegheny county, and he remained in that position up until his death, being re-elected in the years 1879, 1889 and 1899 without opposition, having been nominated by both political parties, so that he was a judge of that court for a period of thirty-seven years.

In the year 1849 he married Miss Katherine King of Maryland, and lived with her in great happiness until her death on June 4, 1905. He left to survive him only two daughters—Miss Katherine and Mrs. James H. McCutcheon.

While a judge, he was active in public matters, filling such varied positions as leader of the choir of Grace Methodist Protestant Church, of which he was a member; an active member of the Union Veteran Legion, Grand Army of the Republic, as

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well as the military order of the Loyal Legion and the Masonic order.

The Judge was of heroic mould: great in stature and dignified and knightly in his bearing. He was affable and polite in intercourse, and seemed ever glad to welcome and talk with anyone, especially those who sought him for assistance or advice. He was generous to a fault; full of the milk of human kindness, and he gave with a disregard of his own needs to those who were in want.

His life from 1862 to 1865 in the army is known of all men, and is a matter of public record. His conscientious discharge of all duties and his courage and bravery on the field of battle won him the title of Brevet Brigadier General. He was of the best type of so many of the sons of Pennsylvania who volunteered for the war, fought for the sacred cause and regarded the result a full reward for all his sacrifices.

To many of us he was better known as a lawyer and a judge. Some of us heard him in 1868 argue a celebrated case to the jury in the quarter sessions court, but from 1869 for nearly forty years we all knew him as a judge, and as such we can truthfully testify that the ermine he wore was as pure and unspotted when he died in 1906 as when he put it on in 1869. He died as he had lived, an honest, honorable man; an upright, conscientious judge.

He was not perhaps what is called a profoundly read and book-learned lawyer or judge, but he brought to the performance of his duties what for want of a better name we call common sense, or hard horse sense. He innately had the faculty of discerning the question upon which the case should turn, and of that question he took a wise, shrewd, comprehensive view like unto the Jewish Judges who sat at the gates of great cities and settled disputes before precedents tied them down. His charges to the jury, his written opinions in cases in equity and at common law did not show the acumen and logical precision of Sharswood or Tilghman, but they, in Judge Collier's own peculiar way, reached right conclusions and were attractive from their unique character. His mode of thought—his processes by which he reached results—were peculiarly his own. With them he accomplished the end which all judges seek—administered justice—decided righteously and rightly.

No judge in Allegheny county since 1869 could so certainly and so quietly control a jury as he did. It was not alone what he said, but that added to his manner of saying it marked him as peculiar in that respect. Many of our judges had deserved weight with juries, but he stood alone in his method.

This can be illustrated by his charge in a case against an unpopular corporation which was sued for the death of a boy. The plaintiff's case was literally overwhelmed by the defendant's testimony, but the sympathy of the jury was relied upon by the plaintiff's lawyer to secure him a verdict. Judge Collier closed his charge by asking with emphasis: "Gentlemen, be men. Remember you are administering justice." This was all, but it was sufficient.

His written opinions were short, but comprehensive. Authorities were not often cited nor principles discussed, but with a manner all his own he applied the facts of the case to some wellknown rule of law and reached a speedy and definite conclusion.

His bearing during the trial was most courteous and kind to the attorneys on either side. He protected from unreasonable wrath the witness in the chair, and he invariably gave to the jury fairly the claims of the respective sides. But Judge Collier was not only a lawyer and a judge—he was in addition a learned man in various directions. He was excessively fond of music, and what may seem curious, he was connected with a church in Sharpsburg for many years of his life and during most of that time he was leader of the choir, and took great satisfaction in training them for their work and joining them in its perrormance.

He was a lover of art and evinced wonderful knowledge of the great paintings of the greatest masters, and was so thoroughly up in the standard masters of all ages that he could locate the great pictures of the world one by one in the different galleries of Europe. He was a well read man in general; was no mean Latin scholar, and read in the original Latin during his period on the bench.

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During his career in Allegheny county from 1851 to 1906 he was one of very many noted and distinguished men. When we think of the lawyers and the judges who have passed away during that period, each of whom was great in his day, we may well be proud of the Allegheny county bench and bar, and of Judge Collier as a member of each. The names of Hamilton, Marshall, Hampton, Fetterman, Woods, Shaler, Loomis, and many, many others will be at once recalled, and when we add that Judge Collier easily took his rank among them, it gives him great honor.

He died after a most eventful, varied and useful life, full of honors and of years, and has gone to join the many other great ones he knew in his earthly career.

Court of Common Pleas No. 2,

ALLEGHENY COUNTY.

HICKS v. RIEBLING.

Mechanics' liens—Notice of filing lien—Act of June 4, 1901, section 21.

Under the twenty-first section of the act of June 4, 1901, which requires that notice be given the owner within thirty days after the filing of a mechanics lien a lien will be stricken off where no notice has been given. The requirement is mandatory.

M. L. No. 1 April Term, 1906. Sur rule to strike off lien.

Opinion by FRAZER, P. J. Filed June 4, 1906.

The lien filed in this case is to secure the payment of a balance of $395 with interest thereon from November 25, 1905, for plastering done on the premises described, defendant being the owner, and plaintiff a subcontractor. The lien merely sets forth that the material was furnished and the work and labor done under a verbal contract with the general contractor and notice of intentien to file the lien was served upon the owner November 29, 1905. A number of reasons are given in support of this rule. We need, however, only consider the one which alleges failure upon the part of the claimant to give notice of the filing of the claim within thirty days thereafter. The twenty-first section of the act of June 4, 1901, provides as follows:

"Within one month after the filing of the claim the claimant shall serve a notice upon the owner of the fact of the filing of the claim, giving the court, term and number and the date of filing thereof; and shall file of record in said proceedings an affidavit, setting forth the fact and manner of such service. A failure to serve such notice and file an affidavit thereof within the time specified shall be sufficient ground for striking off the claim."

As stated above no affidavit of notice was filed in this case as required by the section of the act above quoted. The right to the lien being purely statutory, claimant must comply with its requirements in all respects in order to avail himself of its terms. Not having done so in respect to the notice required by the section quoted, his lien is not valid and must be stricken off. This requirement has been held, we think very properly, to be mandatory: *Compton* v. *Sankey*, 13 D. R. 535, and *Walter & Son* v. *Power*, 13 D. R. 667.

Rule absolute.

SAME v. SAME.

Supplemental opinion by FRAZER, P. J. Filed June 20, 1906.

Since filing our opinion of June 4, 1906, striking off the lien in this case, we have examined plaintiff's supplemental brief, which is principally upon his right to amend the lien by inserting therein an allegation that notice of the filing of the claim was served upon the owner, such service, however, not being had within one month as required by the act of assembly. An examination of the cases cited has not convinced us of plaintiff's right to make the amendment under the circumstances. The cases referred to in the supplemental brief do not, in our opinion, rule the question before us here. In those cases a duty was performed but not stated in the pleadings, and upon petition the court permitted amendments to be made showing the actual facts. In this case the notice required by the act of assembly to be given the owner of the term and number and the date of filing

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the lien was not given. Consequently the cases cited do not apply. Had the notice required by the act been given the owner within thirty days after filing the claim we would, in all probability, have permitted an amendment, but as no notice was given the amendment cannot be allowed, and we must dispose of the case by applying to it the strict terms of the act. We are clearly of the opinion that our order of June 4th making the rule absolute was strictly in accordance with the act of assembly and should not be disturbed.

For plaintiff, *Carney & Martin.*
For defendant, *Schoyer & Hunter.*

Executive Department,

HARRISBURG.

SHIPPENSBURG VACCINATION.

Health law—Compulsory vaccination defined—Costs of vaccination—Liability of the borough. Discretion of council—Procedure by which to collect doctor bill—When the state intervenes. Acts of 1893 and 1905.

The power to "enforce vaccination" contained in Sec. 4 of the act of May 11, 1893, P. L. 44, relating to the organization of boards of health in boroughs, does not mean compulsory vaccination in a general sense, but only under conditions of infection and contagion which render such enforcement necessary.

Under Sec. 7, of the act of 1893, it is within the discretion of the borough council to fix the amount of an appropriation of funds to meet the estimated annual expense account submitted by the board of health or make provision for payment of bills already contracted by said board.

There is no act of assembly which in terms renders a borough liable for the expense (incurred by the board of health) of vaccinating school children whose parents are in indigent circumstances and unable to pay for the same where the borough council neglects or refuses to appropriate the necessary funds to meet such expense. However, the borough council cannot arbitrarily refuse, but the duty of making an appropriation is quite clearly stated in the act, provided the means of information for the intelligent exercise of judgment have been previously supplied.

If it should be shown as a fact that the borough had received funds from fines and penalties which had not been appropriated to the support of the health board, and if it should be further shown that the health board had submitted an annual estimate of its probable receipts and expenditures, then it would become the duty of the council to make an appropriation, or at least show reasonable cause for not doing so.

The question can be raised by mandamus issued at the instance of the borough board of health through a solicitor. And the matter could also be tested in an action of assumpsit by the doctor against the borough to recover the sum of money due him for services rendered at the instance of the board of health of the borough.

The conditions contemplated by the act of April 27, 1905, P. L. 317, were those of such extraordinary danger to public health as to be beyond the ability of the local authorities to check or relieve.

Request of Health Commissioner Dixon for opinion.

Opinion by CARSON, Attorney General. Filed April 14, 1906.

I am in receipt of your letter of the 24th ult. referring to this department a communication from J. K. L. Mackey, health officer of the borough of Shippensburg, requesting an opinion as to the liability of the borough for payment of certain expenses incurred by the local board of health in employing a physician to vaccinate school children whose parents are too poor to pay, for which expenses the counsel of said borough refuses to make appropriation.

You ask me the question: Who is legally responsible for the payment of bills contracted by local boards of health for the protection of the health of the community, when the council of the borough refuses to pay such bills or to allow the board sufficient appropriation to meet the obligations incurred? The facts relating to the communication of Mr. Mackey raise a question which is narrower than the one put in your letter of transmittal. Mr. Mackey's case is that of school children of poor parents, vaccinated by the physician of the health board of the borough by the direction of the board. Your question would involve expenses of all kinds incurred in the protection of the public health, of which vaccination might be but a single item. It is necessary to discriminate between the action of local boards and the action of your department.

The act of May 11, 1893, P. L. 44, relates to the organization of boards of health in

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boroughs, and in sections 2 and 3 prescribes the duties and powers of such boards. Substantially they are the same, *mutatis mutandis*, as those boards of health in cities of the third class, under the act of May 23, 1889, P. L. 306. It is provided that all fees which shall be collected or received by the board or any officer thereof in his official capacity, shall be paid over into the borough treasury monthly, together with all penalties which shall be recovered for the violation of any regulation of the board; section 4 of the act of 1893 defines the powers and duties of such boards with regard to infectious diseases, and, inter alia, empowers them "to enforce vaccination." The context leads me to the belief that these words do not mean compulsory vaccination in a general sense, but only under conditions of infection and contagion which render such enforcement necessary. Section 7 of the same act provides that "it shall be the duty of the board of health to submit annually to the council before the commencement of the fiscal year an estimate of the probable receipts and expenditures of the board during the ensuing year, and the council shall then proceed to make such appropriation therefor as they shall deem necessary."

Under the provisions of this act it is within the discretion of the borough council to fix the amount of an appropriation of funds to meet the estimated annual expense account submitted by the board of health or make provision for payment of bills already contracted by said board, I am unable to find any other act of assembly, which defines the extent of the discretionary power of council with regard to expenses contracted by boards of health, nor can I find any decision of the courts under this act. Neither do I find any act of assembly which in terms renders the borough liable for the expense of vaccinating school children whose parents are in indigent circumstances and unable to pay for the same, where the borough council neglects or refuses to appropriate the necessary fnnds to meet such expense.

In my judgment, if it should be shown as a fact that a borough had received funds from fines and penalties which had not been appropriated to the support of the health board, and if it should be further shown that the health board had submitted an annual estimate of its probable receipts and expenditures, then it would become the duty of the council to make an appropriation or at least show reasonable cause for not doing so. I do not believe that the borough council can arbitrarily refuse to make an appropriation or successfully shield itself behind the plea that the matter is entirely within its uncontrolled discretion. The duty of making an appropriation is quite clearly stated in the act, provided the reasonable means of information for the intelligent exercise of judgment have been previously supplied.

The question can be raised by mandamus issued at the instance of the borough board of health through its solicitor, or, if there be no regular solicitor, a solicitor specially anthorized to act in this instance.

Besides this, the matter could also be tested in an action of assumpsit by the doctor against the borough to recover the sum of money due him for services rendered at the instance of the board of health of the borough, relying upon the authority of the following cases: *Allegheny County* v. *Watt.* 3 Pa. 462; *Com.* v. *Harmon*, 4 Pa. 269; *Northampton County* v. *Innes*, 26 Pa. 156; *Allegheny County* v. *Shaw*, 34 Pa, 301.

I am not advised how far the action of the health board in the borough of Shippensburg was caused by any action of yours, or whether you took any official action in the premises. The act of April 27, 1905, P. L. 312, "Creating a department of health and defining its powers and duties," in section 8 provides that "it shall be the duty of the commissioner of health to protect the health of the people of the state and to determine and employ the most efficient means for the prevention and suppression of disease," etc. In section 17 of the same act it is provided that "all necessary expenses under the provisions of this act shall, after approval in writing by the governor and the commissioner of health, be paid by the state treasurer upon the warrant of the auditor-general in the manner now provided by law." If from your knowledge of the facts you can certify that the expense of vaccinating these school children in Shippensburg was a neces-

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sary expense under the provisions of the act just quoted, the local physician to whom the debt is due, can be paid without resorting to mandamus proceedings, but it will be unnecessary for me to point to you the danger of allowing expenses, which ought to be borne locally, to be paid out of the funds of the state.

The governor of this commonwealth on April 27, 1905, approved an act, P. L. 317, "to establish an emergency fund to be used as occasion may require in the suppression of epidemics, prevention of disease, and protection of human life, in times of epidemic diseases or of threatening disease and making appropriation therefor." It is quite clear that the conditions comtemplated by this act were those of such extraordinary danger to public health as to be beyond the ability of the local authorties to check or relieve. Unless the conditions contemplated by this act existed and were made manifest in the manner indicated in the act, I cannot advise you that the expense of vaccination contracted by the board of health in the borough of Shippensburg or in any other borough are payable out of the emergency fund appropriated by the act of April 27, 1905.

Under the act of April 27, 1905, P. L. 312, creating your department and defining its powers, it is clear that the rules and regulations of your department may be promulgated by sending printed copies to all local boards of health, school boards and clerks of councils of cities and boroughs, and the rules and regulations shall be printed in circular form and given to any one who demands them. Section 16 of this act provides that every person who violates any order or regulation of the department of health, or who resists or interferes with any officer or agent thereof in the performance of his duties in accordance with the regulations and orders of the department of health, shall be deemed guilty of a misdemeanor, and shall upon conviction thereof be punished by a fine of not more than $100 or by imprisonment not exceeding one month or both at the discretion of the court.

(From Paul A. Kunkel, Esq., Harrisburg, Pa.)

The power of the legislature to extend the term of county officers by postponing the time for election is denied in State ex rel. Hensley v. Plasters (Neb.) 3 L. R. A. (N. S.) 887.

The depreciation in value, after the maturity of a note, of corporate stock pledged as collateral security, is held, in Lake v. Little Rock Trust Co. (Ark.) 3 L. R. A. (N. S.) 1199, to be no defense to the maker of the note, as the pledgee is not bound to sell the stock if not paid at maturity.

Under section 4b of the Bankruptcy Act, as amended, the U. S. Circuit Court of Appeals, First Circuit, has held in the same case of Matter of Matthews Consolidated Slate Co., 16 Am. B. R. 407, that the word "mining" in a broad sense must be construed to include the quarrying of slate from natural beds, whether open or under ground.

The specific performance of a contract by a manufacturer to furnish a certain percentage of his freight tonnage to a railroad, which does not require the tonnage to be furnished as it accrues, is denied in Lone Star Salt Co. v. Texas S. L. R. Co. (Tex.) 3 L. R. A. (N. S.) 828, upon the ground that it would involve constant supervision by the court.

MUNICIPAL CONSTRUCTION OF AUDITORIUM.—In view of the apparently growing inclination of cities to give municipal aid to the erection of structures designed for auditorium purposes, we call attention to the recent holding of the Supreme Court of Colorado in City and County of Denver v. Hallett, 83 Pacific Reporter, 1066. The court there declares that Colorado Constitution, 120; granting home rule to the city of Denver, and providing that the people in the city shall always have the exclusive power of making altering, revising, or amending their charter, bestowed upon the people all the power possessed by the legislature, so that they were authorized to provide by charter for the erection of an auditorium, to purchase a site therefor, and to issue bonds to discharge the indebtedness arising from its construction.

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PITTSBURGH, PA., NOVEMBER 21, 1906.

Court of Common Pleas No. 3,

ALLEGHENY COUNTY.

Daughters of the American Revolution of Allegheny County, Pa., v. The Pennsylvania Railroad Co.

Streets—Abutting property—Easement.

X conveyed to A a piece of ground known as the "Block-House" reserving to herself the right to represent the property in all proceedings toward the opening of O'Hara avenue. This avenue at the time had been located along the property by ordinance of the city but was never opened and and the ordinance was subsequently repealed. X conveyed her adjoining property as well as her reserved rights in the Block-House to B. A filed a bill in equity to enjoin B from building on O'Hara avenue claiming an easement in the street. Held, that the bill should be dismissed.

No. 210 Novmber Term, 1904. In equity.

Opinion by KENNEDY, P. J. Filed October 19, 1906.

The object of this bill is to enjoin the defendant company from obstructing, by building or otherwise, within its lines, O'Hara avenue, a street located by the city of Pittsburgh but never opened, and the ordinance for the location of which was subsequently repealed.

The material facts, which are undisputed, are as follows, viz:

First. An ordinance of the city of Pittsburgh, locating O'Hara avenue, sixty feet wide, from water street to Sixth street, and running about midway between Penn avenue and Duquesne way, in said city, was approved October 9, 1832, a copy of which ordinance is attached to plaintiff's bill, marked "Exhibit A." From Water street to Third street, this avenue was located wholly on property then owned by Mrs. Mary E. Schenley, except where it crossed other open streets and alleys, and on it were a large number of buildings.

Second. The plaintiff is a corporation organized under the laws of Pennsylvania, for the purpose, as expressed in its charter, of maintaining private parks in Allegheny county, Pennsylvania, in which to preserve the Block-House built by Colonel Bouquet, now in the first ward of the City of Pittsburgh, and other archeological remains in said county, and for the purpose of perpetuating the historical associations surrounding the same, and promoting historical research.

Third. By deed of gift, dated March 15, 1894, duly executed, delivered and recorded Mrs. Mary E. Schenley conveyed to the plaintiff certain property therein described, upon which is located the Block-House mentioned in the second paragraph of plaintiff's bill, for the purpose set forth in plaintiff's charter, as stated in said deed, a copy of which is attached to plaintiff's bill, marked "Exhibit B." In this said deed, the grantor, Mrs. Schenley, made the conveyance of the property known as the Block-House property, subject to the right of herself to represent the said described property in all proceedings looking to the opening of O'Hara avenue and the vacation of Fort street and Point alley, her purpose, as stated therein, being to retain and reserve and not part with the right to petiton the City of Pittsburgh in behalf of said real estate to open said O'Hara Avenue and to vacate said Fort Street and Point Alley; and stating also in said deed that she made the conveyance for the purpose of the corporation (plaintiff) named in the second finding above, "and for no other use or purpose whatever, the said Block-House and premises to revert to the party of the first part thereto" (Mrs. Schenley) "and her heirs ipso facto upon the failure or neglect of the party of the second part," (plaintiff), "or its successors, to maintain and preserve them as aforesaid for the uses and purposes aforesaid."

Fourth. An ordinance of the City of Pittsburgh repealing the ordinance locating O'Hara Avenue, as stated in the first finding above, was approved January 3, 1901. A copy of this repealing ordinance is attached to defendant's answer marked "Exhibit 1."

Fifth. The deed mentioned in the third

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finding above, described the land conveyed as bounded inter alia by O'Hara avenue, as then located by the city of Pittsburgh, of a width of sixty feet, but not opened, and reserved to the grantor, Mrs. Schenley, the right to petition the city of Pittsburgh in behalf of the land conveyed to open said O'Hara avenue and to vacate Fort street and Point alley, which also bounded the land conveyed, as well as the other reservations mentioned in the third finding above, and more fully set forth in the said deed. And said Fort street and Point alley were subsequently vacated by the city of Pittsburgh.

Sixth. By deed dated February 12, 1902, duly executed and delivered and recorded, Mrs. Schenley conveyed to H. C. Frick, inter alia, the property situated in the first ward of the city of Pittsburgh, bounded by Third street, Penn avenue, Water street and Duquesne way, including the Block-House property, an interest in which had been heretofore conveyed to plaintiff, as stated in the third finding above; but "excepting and reserving from this conveyance such title and interest as she" (the party of the first part) "by deed dated March 15, 1894," (mentioned in the third finding above) "granted and conveyed to the Daughters of the American Revolution of Allegheny County, Pennsylvania" (the plaintiff) "in the following described lot or piece of ground, being included within the boundaries of the tract of land first above described," and then giving a description of the Block-House property as conveyed to the plaintiff by deed of March 15, 1894, mentioned in third finding above; "but including in the said conveyance all the right, title and interest which she, the said Mrs. Schenley, may have in and to the property included, inter alia, in Fort street, Point alley and O'Hara street, for the vacation of which said streets and alleys ordinances have been passed by the councils of the city of Pittsburgh and approved by the city recorder."

Seventh. By another deed, dated February 12, 1902, duly executed, delivered and recorded, Mrs. Schenley conveyed to H. C. Frick the property known as the Block-House property, as described in the third finding above, subject to the interest in said property which she, the said grantor, conveyed to the plaintiff by deed referred to in the third finding above, but conveying "the reservations and all the right, title and interest of the grantor, Mrs. Schenley, of, in and to the lot or piece of ground, to said H. C. Frick."

Eighth. Subsequently, the said H. C. Frick, by deed duly executed and recorded, conveyed to the defendant in this bill, all the property, rights, etc., conveyed to him by the deeds referred to in the sixth and seventh finding above, and the defendant took the title to said property, etc., with knowledge only of the right of plaintiff as contained in said deeds, and without notice or knowledge of any alleged right or easement of the plaintiff in or over O'Hara avenue, unopened, and the ordinance for the opening of which had been repealed.

Ninth. The Block-House property of plaintiff has now access to it by a twenty-foot strip of ground fronting on Penn avenue, conveyed to plaintiff by deed mentioned in third finding above. Note: This was admitted by the plaintiff on the trial of this case.

The plaintiff claims an easement of passage, sixty feet wide, from Third street to Water street, over what was formerly O'Hara avenue, as located by the city of Pittsburgh but never opened, and the ordinance for the location of which was subsequently, and before Mrs. Schenley conveyed to H. C. Frick, repealed. This claim is based, first, upon the language of Mrs. Schenley's deed to the plaintiff, and also upon oral testimony and letters offered in evidence as tending to show Mrs. Schenley's intentions; all of which were objected to by the defendant's counsel. This oral testimony and these letters were admitted subject to these objections, their competency to be subsequently passed upon.

We now find them to be incompetent and that they should be stricken out for two reasons:

First. Mrs. Schenley's intentions are to be gathered from her deed to the plaintiff, and all prior communications are merged in that deed.

Second. Defendant took title without any

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notice of these matters, none having been averred or proved.

So that plaintiff's claim must depend entirely on its deed from Mrs. Schenley. And in considering this attention is called to certain dates.

First. The ordinance locating O'Hara avenue was approved October 19, 1892.

Second. Mrs. Schenley's deed to the plaintiff bears date March 15, 1894.

Third. The ordinance repealing the ordinance locating O'Hara avenue was approved January 3, 1901.

Fourth. The two conveyances made by Mrs. Schenley to H. C. Frick bear date February 12, 1902; and subsequently H. C. Frick made his conveyance to the defendant.

The ordinance locating O'Hara avenue, passed October 19, 1892, merely created a paper or plotted street, and was entirely the act of the city of Pittsburgh, with which Mrs. Schenley had nothing whatever to do, and which street she never recognized as an existing or opened street. The deed of Mrs. Schenley to the plaintiff, which bears date March 15, 1894, was a deed of gift and in the description of the property conveyed uses very accurate language in reference to the streets and avenues bounding the property, recognizing Penn avenue, First street, Third street and Fort street as existing streets, while as to O'Hara avenue the language is different but quite as accurate and specific: "On the southerly side of O'Hara avenue as at present located by the city of Pittsburgh, of a width of sixty feet, but not yet opened."

Attention also is called to the significant language used by Mrs. Schenley in the reservation in this deed to plaintiff. She reserves to herself the exclusive right to represent Fort street and Point alley in proceedings to vacate them, because they were at the time existing, opened streets; while as to O'Hara avenue, she reserves the exclusive right to represent the land in all proceedings looking to the opening of O'Hara avenue. There was nothing to vacate as to O'Hara avenue; hence the appropriateness of the language.

Why this precise and unmistakable language with reference to O'Hara avenue? Plainly because she owned the balance of the property, and her buildings, of which there were a large number, were located within the lines of this projected street. Is it at all likely that Mrs. Schenley should have intended to convey to plaintiff, without any consideration, any right or control over this unopened street which would affect so vitally her other property? Her language shows that she intended the plaintiff, to whom she was giving the Block-House property, should have no rights as to O'Hara avenue, which was an unopened street and might never be opened, and that instead of giving the plaintiff the right of an abutter, her purpose was to reserve such right exclusively to herself in case the street was ever opened.

Easements granted by conveyances calling for a street as a boundary are based upon the ground of implied estoppel. The grantor in his deed declaring the existence of a street is estopped to deny it; but in all such cases there must be a street corresponding with that described in the conveyance, and in all the cases cited by the plaintiff in which an easement was declared, created by such description, the instrument described the street as existing. This is not done here. Mrs. Schenley states that O'Hara avenue is only located by the city of Pittsburgh, not by her, and is not yet opened and may never be opened; but in case there be proceeding for its opening, she reserves all right to represent the land in that proceeding. She says nothing about the repeal of its location, as that matter was wholly within the control of the city and this control was exercised when, on January 3, 1901, the city passed its ordinance repealing the location of O'Hara avenue. O'Hara avenue never actually existed as a street, and its location was thus wiped out.

Then followed, on February 12, 1902, the deeds of Mrs. Schenley to Mr. Frick, and later the conveyance of Mr. Frick to the defendant. In the deeds of Mrs. Schenley to Mr. Frick she uses the same careful and appropriate language with reference to O'Hara avenue as in the deed to plaintiff, and conveys to Mr. Frick not only the property, but all rights reserved in her deed to plaintiff; and there is nothing in them to sustain the plaintiff's claim that a right to an easement

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was created. On the contrary, the language used by Mrs. Schenley and the circumstances attending the conveyances completely negative the implication of such a grant or creation. These positions are fully sustained by *Billinger* v. *Union Burial Ground Society*, 10 Pa. 135, and *Neely* v. *Philadelphia*, 212 Pa. 551.

Our conclusions of law are:

First. The plaintiff has no interest or easement in O'Hara avenue, or in the land within the lines of the same as originally located but never opened.

Second. That this bill must be dismissed at plaintiff's costs.

Let a decree be drawn accordingly.

For plaintiff, *S A. Ammon, E. B. Scull* and *A. M. Imbrie.*

For defendant, *Patterson, Sterrett & Acheson.*

Court of Common Pleas No. 2,

ALLEGHENY COUNTY.

DEMAS v. SNYDER et al.

Replevin—Distress for rent—Act of April 19, 1901, P. L. 88—Demurrer.

The act of April 19, 1901, was intended to apply to cases of replevin where the goods are taken in distress for rent.

Where a tenant replevins the goods levied upon by his landlord, it is proper to proceed in accordance with the practice psescribed by the act of 1901. In such a case plaintiff should set out his title and possession of the goods and that they were taken from him by the landlord who in turn should set out his right to do so by way of distress. It is not good practice that plaintiff anticipate the defense in his statement and traverse it.

No. 560 January Term, 1906. Sur demurrer to statement in replevin.

Opinion by SHAFER, J. Filed June 1, 1906.

The plaintiff alleges his occupancy of a certain house of one of the defendants; that during his occupancy of the premises an adjoining owner excavated for a cellar and let down the wall of the house occupied by the plaintiff, and that the defendant, although notified to do so, had not shored up the wall; that thereby the plaintiff was forced to leave the building and was not able to occupy it for over two months; that thereafter the defendant issued a landlord's warrant and levied upon certain goods and chattles of the plaintiff described in the notice of distraint, a copy of which is attached to the statement; and that by reason of the premises he is not liable for the rent for July and August, 1905; wherefore, he says the title to the said goods and chattels is in himself and that he holds them lawfully and has suffered damage to the amount of $400. To this the defendant has demurred on the ground that the plaintiff's statement does not show facts which indicate that the plaintiff does not owe the rent claimed.

Until the recent case of *Drumbolle* v. *Lyle*, in the Superior Court, not yet reported, there was a difference of opinion among practitioners and among the various courts of common pleas of the commonwealth, as to whether the act of April 19, 1901, P. L. 88, was intended to apply or could be applied to actions of replevin where the goods were taken upon a distress for rent. The opinion of the superior court above mentioned has removed the doubt, and it is thereby determined that the Act of 1901 applies to all actions of replevin. In that opinion it is pointed out that the act may be applied to replevin in cases of distress for rent by the plaintiff setting out as in other cases his title and possession of the goods in question and the fact that they were taken away from him by the defendant, and that the defendant may then in his affidavit of defense admit the fact of his taking and set up his right to do so by way of distress for rent. And it is further said that "it is not necessary that the plaintiff anticipate the defense which may be set up and traverse it; to do so would tend to confusion and reverse the logical order of proof."

In the case at bar the plaintiff has undertaken to anticipate the defense, to some extent at least, but he has also averred title to be in himself. The allegations of the statement which are in anticipation of a supposed defense should be treated as surplusage. The statement is not as clear as it might be as to the taking of the property by the defendant, nor as to its value, and the plaintiff may perhaps find it advisable to improve it in these respects by amendment, yet we can not say that it is insufficient.

The demurrer is therefore overruled.

For plaintiff, *W. J. Brennen.*

For defendant, *O'Brien & Ashley.*

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Orphans' Court,

ALLEGHENY COUNTY.

In re Estate of GEO. S. FLEMING, Deceased.

Substitution—Liability for debts.

F. gave his real estate in trust for fifteen years—to pay his children the net income free from any pledge, encumbrance or anticipation; provided that if any of such children should die within the term of the trust his share should go to his heirs or devisees on the same conditions, and at the end of said term the land should be divided accordingly. Held, that his devisee took free from his debts.

No. 374 September Term, 1905.

Opinion by HAWKINS, P. J. Filed November 5, 1906.

STATEMENT.

The question involved in this case is whether or not the fund embraced in this account is liable for the debts of this decedent?

The facts are these:

The fund is the proceeds of sale of land in partition derived under this clause of the will of Joseph Fleming, father of this decedent:

"Fourth. All the real estate which at the time of my death I may own that is situated in the city of Pittsburgh, Pa., I give, bequeath and devise to my said hereinafter named executors, or the survivors of them, in trust for the following uses and purposes and not otherwise: For the period of fifteen years after my decease my said executors or the survivor of them shall take charge of said real estate, keep the buildings and improvements thereon insured and in good repair, rebuild the same in case of fire, keep the same rented and collect the rents thereof and after deducting taxes, cost of insurance, repairs, etc., the net income derived therefrom shall be divided and paid over quarterly to and among my six children Geo. S. Fleming * * * * * During said term of fifteen years said real estate shall not be liable or subject to any execution or other legal process for any debt, liability or engagement of any of my children. None of my children shall during said term have the right to sell, pledge or in any other way anticipate their respective shares in the rents or income of said real estate, nor shall they have the power to sell, mortgage or otherwise encumber their respective interests therein. At the expiration of said term of fifteen years after my decease the said trustees or the survivor of them shall cause said real estate to be fairly valued and appraised and shall divide the same equally among my six children above named, or if any of my children shall have died before the time fixed for said division, to the children then living and the heirs at law or devisees of the child or children who shall have died, the said trustees shall execute and deliver any necessary and proper conveyance or papers for these shares or interests to those respectively entitled thereto. The death of any of my children shall not in any wise affect the provisions of this trust but the share or shares of the one, or of those so dying, shall descend to his, her or their heirs at law or devisees subject to all the conditions herein named."

Geo. S. Fleming died before the end of the period of the trust leaving a will in which he directed

(a) His debts and funeral expenses should be paid; gave

(b) A legacy of $25,000 to his executor; and

(c) The residue of his estate to his widow.

He left other estate than that mentioned in his father's will; but this was insufficient to pay his debts and his creditors claim the balance due them out of the present fund upon two grounds,

(1) That there was a vested estate in Geo. S. Fleming; or, if not,

(2) That his direction to pay his debts was an exercise of his power of appointment in favor of his creditors which was operative to charge this fund.

OPINION.

The solution of the question involved in this case turns on the proper construction of the will of Joseph Fleming, deceased, under which Geo. S. Fleming took whatever estate he had.

It may be conceded that Geo. S. Fleming took a vested equity in the corpus of the trust estate under his father's will; but it is just as clear that that interest was divested by his death before the time of division. If the six children survived the period of fifteen years, equal division should be made among them; but "if" any of them should die before that time, his or her share should be divided among the children "then living or the heirs at law or devisees of the child or children who shall have died;" in other words it was made a condition of conveyance to the children that they survive the trust; but in the event of death before that time devisees should take by way of substitution, The words "heirs" and "devisees" are

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simply descriptive of the persons who were intended to take. When the contingency of death should happen the right to income and conveyance passed according to the "provisions" of the will. There was no power of impairment of the integrity of the estate in transmission. Even if there had been no clause of exemption from executionary process in the will, Geo. S. Fleming's creditors could have acquired no more than the interest which he had; and that was defeasable by his death. They must have taken "subject to all the conditions named" in the will; and these vested the right to rents and conveyance in his devisees: *Barker's Estate*, 159 Pa. 518.

The case is distinguished from *Reed's Appeal*, 118 Pa. 215, upon which claimant relies, in this that "heirs" and "devisees" take by way of substitution on "the same conditions" as the deceased child—and conveyance of the corpus of the trust at the time of division is to be made directly to them. Geo. S. Fleming's executor could have no right of recovery, and his creditors therefore no status.

But assume that Mrs. Fleming took, not because of the exercise of a power, but directly from Geo. S. Fleming, these claimants are in no better position. The plain purpose of Joseph Fleming was to protect the objects of his bounty in the enjoyment of both corpus and income during the period of the trust, and therefore created a spendthrift trust. The scope of this trust was not simply, as suggested by claimant's counsel, to suspend executionary process. Testator declared not only that the real estate which was the subject of disposition should be exempt from legal process during fifteen years, but that none of his children should during said term have "the right to sell, pledge, or in any other way anticipate their respective shares in the rents or income of said real estate, nor shall they have the power to sell, mortgage, or otherwise encumber their prospective interests therein." Death, said testator, "shall not affect any of these provisions;" and the "conditions of the trust" shall continue operative. The necessary implication is that testator's intended bounty should be transmitted in its integrity—that Mrs. Fleming should enjoy the rent during the remainder of the term, and the real estate at its expiration without diminution.

But it is suggested that Geo. S. Fleming had at least a power to appoint, and his direction to pay his debts is an exercise of that power in favor of his creditors. The objection to this is two fold: because it is inconsistent with

(a) Testator's prohibition of pledge or anticipation; and

(b) Mrs. Fleming's right to a conveyance of the corpus of the trust estate without diminution.

The "real estate" which was made the corpus of the trust, is the "real estate" which was to be equally divided at the expiration of the trust and therefore divided in its integrity. It must of course be conceded that if Geo. S. Fleming had survived, lien might then have been acquired and his share taken in execution; but in view of testator's positive prohibition against pledge, encumbrance, or anticipation, such lien was impossible by any act of Geo. S. Fleming prior to the time of division; and it could not be created by operation of law because as already suggested testator declared that his interest should pass to his devisees on the "same conditions" in which he held it; and and therefore free from any pledge, encumbrance, or act of anticipation. The estate was Jos. Fleming's to give or withhold as he saw fit; and having exercised his power of disposition in a legal manner, neither his son nor his son's creditors could disregard his bar of liability for debts. By the express terms of the will, the trustees were bound to "execute and deliver any necessary and proper conveyance" of the share to George's devisee at the time fixed for division on the same conditions as he would have taken had he survived. The concession of Mrs. Fleming's right to rents beginning with her husband's death, is a concession of a vested interest in the land which became absolute on her survival of the trust. If George's creditors could have any status so must hers, for they took on the same conditions; and how could their rights be adjusted in distribution? But Joseph Fleming's manifest purpose was to protect his bounty from any liability to debts during the continuance of the trust. This purpose being apparent on the face of the will, creditors are presumed to have dealt with notice, and are therefore without equity.

For accountants, *B. Eriedman* and *Jas. F. Kane.*

For exceptants, *Jos. Stadtfeld.*

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PITTSBURGH, PA., NOVEMBER 28, 1906.

Court of Common Pleas No. 3,

ALLEGHENY COUNTY.

PATTERSON v. COOK et al.

Stock certificate—Assignment in blank—Transfer by delivery—Bona fide purchaser.

A borrowed money from the X bank, giving his note and a certificate of stock as collateral security, the certificate being transferred in blank, with power of attorney in the usual form. The cashier of the bank fraudulently took the stock certificate and delivered it to B, who in turn delivered same to the C Trust Company as collateral security for a loan A negotiated at that time. C made no inquiry as to the ownership of the stock, and had no notice of any fraudulent transactions connected with it. Held, that C was a bona fide purchaser for value of the stock certificate, and was entitled to hold it until its loan to B was fully paid.

The transaction was in accordance with the universal custom in bank business, and the title to the stock certificate, signed in blank as above mentioned, passed with delivery.

No. 784 November Term, 1905. In equity.

Opinion by KENNEDY, P. J. Filed July 14, 1906.

The original bill filed in this case was by D. L. Patterson, plaintiff, against Lemert S. Cook, the Guarantee Title & Trust Company, a corporation, and Thomas Rinaker, receiver of the Enterprise National Bank of Allegheny, a national banking association, its object being to obtain possession of a certain certificate for fifteen shares of the capital stock of the Duquesne National Bank of Pittsburgh.

The bill alleged that the plaintiff was the owner of said stock and had pledged the same and delivered the said certificate therefor to the Enterprise National Bank of Allegheny as collateral security for a loan obtained by him from said bank; and that one T. Lee Clark, the cashier of said Enterprise National Bank, had feloniously and in violation of his trust taken said certificate of stock from among the assets and collateral of said bank and delivered the same to the defendant, Lemert S. Cook, without any valuable consideration, and with notice on the part of the said Cook that the said shares of stock were not the property of the said bank or the said Clark, but were the property of the plaintiff, and that the said certificate was, at the time of filing said bill, in the custody of said Guarantee Title and Trust Company, and that neither the said Clark nor the said Guarantee Title and Trust Company had any right or title to said certificate of stock.

Upon the filing of the bill, a preliminary injunction was ordered to be issued restraining the said Cook and the Guarantee Title and Trust Company from selling or negotiating the said certificate of stock, and from parting with the custody or keeping of the said certificate in any way.

To the said bill answers were filed by the said Lemert S. Cook and the said Guarantee Title and Trust Company denying the material averments as to them. An answer was also filed by Thomas Rinaker, receiver of the Enterprise National Bank, substantially admitting the averments of plaintiff's bill and asserting title to the said certificate as the pledgee thereof, as stated in plaintiff's original bill, and demanding that the same be delivered to him. Subsequently, the said defendant, Thomas Rinaker, receiver of the Enterprise National Bank of Allegheny, filed a cross bill in this case, as plaintiff, and against D. L. Patterson, Lemert S. Cook and the Guarantee Title and Trust Company, alleging the same facts as stated in the original bill filed by the plaintiff, D. L. Patterson, and in his, the said receiver's answer thereto, claiming further that said Lemert S. Cook and said Clark, for the purpose of procuring money wherewith to meet financial obligations, had wilfully and feloniously taken from the vault of said bank the certicate of stock of the Duquesne National Bank so pledged by said Patterson to said bank, and also three six per cent gold bonds of the Arkansas Water Company of the par value $1,000 each, which belonged to the Enterprise National Bank as bailee thereof for

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safekeeping without reward, and delivered the same to Cook for the purpose of enabling said Cook to fraudulently pledge or dispose of the same for the purpose of raising money for said Clark's use, or the use of said Clark and said Cook, who thereupon pledged the same to the Guarantee Title and Trust Company; and praying for a decree that he, as receiver of said bank, was of right entitled to the custody and possession of said fifteen shares of stock and of the certificate therefor as the pledgee thereof, and enjoining and restraining said Cook and the Guarantee Title and Trust Company from selling or disposing of the same and of said bonds of the Arkansas Water Company, and that said certificate of stock and said three bonds be delivered to the said receiver; and also asking that if said bonds have been sold and disposed of by said Guarantee Title and Trust Company, an account be taken of the value of the same, and it be adjudged and decreed that he, as receiver, was entitled to recover the value thereof from the said company.

To this cross bill answers were filed by the Guarantee Title and Trust Company and by Lemert S. Cook denying all the material allegations thereof as affecting them. An answer was also filed to this cross bill by D. L. Patterson admitting all the allegations thereof.

The certificate of stock in question in this case was issued to the plaintiff, D. L. Patterson, as appears by its date, February 28, 1878. A copy of it appears in the answer of the Guarantee Title and Trust Company to the original bill, on the back of which appears a power of attorney in blank to sell, assign and transfer to blank, or any other person, the shares of stock mentioned in the certificate; which power of attorney so endorsed also bears date the twenty-eighth day of February, 1878.

On or about the 30th of April, 1903, the plaintiff, Patterson, obtained a loan from the Enterprise National Bank of Allegheny of $3,900, as appears by his note, dated April 30, 1903, for said sum; and as collateral security for said sum and any other liability to the holder of said note he deposited the said certificate and also a certificate for twenty shares of the capital stock of the Union Storage Company. A copy of said note appears in the answer of Thomas Rinaker, receiver of the Enterprise National Bank, to the original bill. At the time of the making and delivery of said note and certificates of stock to the said bank, with the power of attorney thereon endorsed, there was attached to the said note another blank assignment and transfer and power of attorney to make transfer on the books of said bank, which appears by the testimony to have been delivered to the bank at the time of its making said loan. On the said note interest was paid by the plaintiff, Patterson, up to the 1st of October, 1905.

This certificate of stock of the Duquesne National Bank seems, according to the testimony, to have remained in the custody and possession of said bank up to about the 23d day of August, 1905, when, as appears from the testimony, it was wilfully and feloniously taken from the vault of said bank and delivered to the defendant, Lemert S. Cook, by T. Lee Clark, the cashier of said bank, and at the same time Clark also delivered to Cook the three Arkansas Water Company bonds herein before mentioned. And on or about this date Cook applied to the Guarantee Title and Trust Company for a loan of five or six thousand dollars, offering as collateral security for the payment of the same the certificate of stock named and also the three Arkansas water bonds. No assignment or power of attorney to transfer the same appeared with the certificate of stock at the time Cook made his application to the Guarantee Title and Trust Company, other than that endorsed upon the back of the certificate, dated April 28, 1878; and, upon objection being made by the Guarantee Title and Trust Company to the age of the power of attorney, Cook offered to obtain a new power of attorney, which he subsequently did through Clark by false representations by him, Clark, to said Patterson, bearing date the 26th day of August, 1905, and on or about said last named date the Guarantee Title and Trust Company loaned to said Cook the sum of $5,500, for which the said company took Cook's demand note, bearing the same date, accompanied by the certificate of stock in question and the Arkansas water bonds.

Considering first, then, the claim of the Guarantee Title and Trust Company to the stock and certificate therefor and the bonds, that company would seem to be in the posi-

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tion of a pledgee taking such certificate in good faith and for value, without any notice that the pledgor, Cook, held them otherwise than as absolute owner, and is therefore as fully protected in its rights thereto as if Cook was the real owner. And although, so far as the real owner, Patterson, is concerned, the stocks were stolen by Clark from the Enterprise National Bank, of which he was cashier, and transferred to Cook, yet the title thereto passed to the Guarantee Title and Trust Company, they being taken both in good faith and for value, without any notice of the manner in which they had been obtained by Cook. This rule applies, not upon the ground that the certificate of stock was negotiable, but for the reason that the owner had enabled his pledgee to dispose of the stock as his own; and as between the owner and the bona fide pledgee (in this case, the Guarantee Title and Trust Company) the owner must bear the loss, he being estopped to deny the right of his pledgee as against such bona fide pledgee from the owner's pledgee; and for the further reason that where one of two innocent parties must suffer from the fraud of a third party, the loss must fall upon him who enables the third party to perpetrate the fraud.

As to the bonds, they appear from the testimony to have been made payable to bearer, and the title to them passed by delivery. They were negotiable, and the Guarantee Title and Trust Company being, as before stated, an innocent holder, without notice, took title to them as collateral security for the Cook note.

It would seem that there was no difference in this transaction, so far as the Guarantee Title and Trust Company is concerned, from the universal custom in such transactions in the banking business; and it follows that the title of the Guarantee Title and Trust Company to the securities named, as collateral security for the payment of the Cook note, cannot be impeached.

It appears from the testimony that the Guarantee Title and Trust Company, under the authority given them in their pledge, disposed of the Arkansas water bonds, and must credit (as they have already done) the amount realized therefor on their claim. That amount was the sum of $2,970, and it is admitted that this was a fair market value for the bonds. And they therefore hold the certificate of stock in question only as collateral security for the balance of their claim, which is the sum of $2,545.92, with interest from November 1, 1905; and it is admitted that, taking the present market value of this stock, there is a surplus therein over and above the balance of the debt of the Guarantee Title and Trust Company, the claim to which is in dispute between the owner, D. L. Patterson, and the receiver of the Enterprise National Bank, to whom it was pledged, plaintiffs on the one hand, and Lemert S. Cook, defendant, on the other hand.

It seems that the title of Cook to the securities named is entirely different from that of the Guarantee Title and Trust Company. It is plain that Clark fraudulently abstracted these securities from the vault of the Enterprise National Bank, of which he was cashier, and transferred them to Cook; and it is claimed on behalf of the plaintiffs in both the bill and the cross bill, that Cook, from the circumstances attending the dealings between himself and Clark, knew or should have known that these securities were so fraudulently abstracted.

In considering this question, it is necessary to refer briefly to the dealings between Clark and Cook. They became acquainted some time prior to November, 1904. The precise date of this acquaintance, it seems unnecessary to consider; but in the month of November, 1904, Cook, as appears by the testimony, opened his account with the Enterprise National Bank, of which Clark was the cashier. The first deposit he made in said bank was on the twelth of November, of that year, but several days prior to making such deposit he had commenced drawing checks upon said bank, one check being drawn on the fourth of November and the other on the seventh, which were promptly paid. This in itself is ground for suspicion as to the honesty of the dealings between Cook and Clark, so far as the Enterprise Bank is concerned, at their very inception. And although on the twelfth Cook made a deposit in the bank of more than sufficient to cover the two checks that had been previously drawn, yet on the fifteenth of November, three days after making such deposit, his account was overdrawn in said bank, and continued to be overdrawn frequently to a large amount from that time up until the first of March, 1905, he having in the meantime made but four deposits, aggregating $3,882, while he had drawn a large number of checks, making his overdraft at that time $1,850.10, at which time his pass-book was settled. And from that time up until the

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failure of the bank became known, October 18, 1905, there were no entries made in his pass-book, although he claims to have made large deposits under arrangements between him and Clark. No such deposits appear on the books of the bank; and, although innumerable checks drawn by said Cook, on many of which Clark's name also appears, signed by himself in pencil, were paid by the bank, no account of them appears on the books of the bank, nor does Cook seem to have any account of them, nor does he seem to have paid any attention to the condition of his account; but, without any knowledge or inquiry thereto, drew checks *ad libitum*, all of which were taken care of by Clark fraudulently as to the bank, and when the failure of the bank became known Cook's account, so far as the books show, was overdrawn, and if all checks had been charged his overdraft would have been upwards of $50,000. Considering the length of time covered by these transactions between Clark and Cook, from March 1st to October 18th, their nature, amount and number, it seems impossible to believe that Cook did not know or should not have known the fraud that was being practiced on the bank by the use of its funds and assets.

During this time Clark was largely interested in enterprises, some of them in Mexico, others, the Pennsylvania Development Company, Okanagan Construction Company, the Kentucky Fields Coal Company, and others, in some of which Cook was also interested; and in the development of these enterprises Clark, according to the statements of Cook, was sometimes in straits for money, and that he assisted him frequently in raising of money for the purpose, and their dealings, as shown by the testimony, were very close and confidential. In one instance, at least, as admitted by Cook in his testimony, resort was had to the kiting of checks with one Hopewell, for the purpose of obtaining the use of money for seven or eight days. Cook, however, claims that this was for Clark's benefit. In another case, Cook gave Clark a check upon the Enterprise National Bank for $25,000, when he knew he had not the funds in the bank for that amount, which check Clark certified to be good. This was for the use of the Okanagan Construction Company, one of the projects in which Clark was largely interested, and this check was certified by Clark as cashier, not at the bank at all, but in Cook's office in the city of Pittsburgh, the flimsy excuse given being that he as cashier could not certify his own check. This check was sent to New York, and while the Okanagan Construction Company did obtain the money realized upon that check, it was subsequently, and within a very short time, charged to the company on a check thereof signed by Clark.

Another instance. At or about the time of the application to the Guarantee Title and Trust Company by Cook for the loan above referred to, he deposited two certificates of deposit, each for the sum of $5,000, issued by Clark, as cashier of the Enterprise National Bank, to Cook, while it is not satisfactorily shown that Cook had any money to his credit in the bank at that time.

But it seems to be wholly unnecessary, in this brief discussion, to mention instances or go further into detail. One or two instances of irregularity might not be sufficient to convince a chancellor that fraud was intentionally committed, or that they might not be satisfactorily explained, but during these eight months, there seems to have been little that was regular by Clark and Cook in their dealings, so far as this bank was concerned; and from all the circumstances taken together, it seems to be established beyond question that Cook did know, or should have known, that Clark was using the assets and securities belonging to the bank wilfully and feloniously; among them, the securities involved in this litigation, and that his claim to these securities or any surplus that may arise therefrom, after the payment of the balance of the claim of the Guarantee Title and Trust Company, is without foundation.

FINDING OF FACTS.

1. In or about the month of April, 1903, D. L. Patterson procured the Enterprise National Bank to discount his promissory note, dated April 30, 1903, for the sum of $3,900, and pledged to said bank as collateral security for the payment of said note, or for any other liability or liabilities of his to the holder thereof, then due or to become due or which might thereafter be contracted (inter alia) certificate No. 14 of the Duquesne National Bank of Pittsburgh, certifying that said Patterson was entitled to fifteen shares of the stock of the said Duquesne National Bank of Pittsburgh, transferable only upon the books of the bank, upon the surrender of said certificate, said certificate being dated February 28, 1878. At the time of pledging said stock certificate the blank form of assignment and power of attorney to transfer the same printed on the back thereof, was duly

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signed by said Patterson, and was in terms as stated in exhibit B annexed to the answer to the Guarantee Title and Trust Company to the original bill. There was also attached to said note a blank assignment and power of attorney to transfer the same upon the books of the company, bearing a later date, namely, at or about the time of the obtaining of said loan from said bank.

2. After the pledging of said stock by said Patterson, the same, together with a note of said Patterson, remained in said bank in the custody of said bank as pledgee thereof, until on or about the twenty-third day of August, 1905, when the same was feloniously taken or abstracted from said bank by T. Lee Clark, the cashier thereof, without the authority of said bank or said Patterson, the owner of said stock, and in violation of the duty of said Clark to said bank and to said Patterson. And at the same time said Clark wilfully and fraudulently took from said bank three six per cent gold bonds of the Arkansas Water Company, of the par value of $1,000.00 each, which had been left with said Enterprise National bank by one Mussler for safe-keeping, without reward and without authority of said Mussler or of said bank, and in violation of said Clark's duties to said bank. Said Clark fraudulently delivered the said bonds and said certificate of stock to the defendant, Lemert S. Cook, for the purpose of enabling the said Cook to fraudulently pledge or dispose of the same for the purpose of raising money for the use of said Clark or for said Cook or both. And thereupon, and on or about August 23, 1905, said Cook endeavored to borrow money on the pledge of said securities from the Guarantee Title and Trust Company, which refused to make a loan on the security of said stock and bonds unless said Cook would procure a new assignment and power of attorney for the transfer of said shares of stock. Thereupon, said Cook communicated said facts to said Clark, and in order to consummate the theft of said securities said Clark fraudulently represented to said Patterson, the owner of said stock, that it was necessary for the security of said Enterprise National Bank that the latter should execute and deliver to said bank a new assignment and power of attorney for the transfer of said stock; and said Patterson, relying on said representation, executed a new assignment and power of attorney to transfer said stock, dated August 26, 1905; and thereupon said Clark, without the knowledge or consent of said Patterson or of said Enterprise National Bank, fraudulently sent the said new assignment and power of attorney, by the messenger of the said Enterprise National Bank, to the Guarantee Title and Trust Company to enable said Cook to pledge and dispose of said stock. Said assignment and power of attorney, dated August 26, 1905, is in form and language as shown in exhibit C, annexed to the answer of the Guarantee Title and Trust Company to the original bill in this case. Thereupon, and on August 26, 1905, said Cook, who, under the evidence in this case appears to have had notice or information of facts putting him on inquiry which would have led him to a knowledge of the fact that said Clark did not own the said stock or said bonds, and was without any right or authority to dispose of the same, and who, under all the circumstances, was not a bona fide purchaser of said stock for value, took said certificate of stock and the blank assignment and power of attorney aforesaid, together with the said three bonds of the Arkansas Water Company, and pledged the same to the said Guarantee Title and Trust Company as collateral security for a loan of $5,500, evidenced by a promissory note of said Cook, dated August 26, 1905, a copy of which is annexed to the answer of the Guarantee Title and Trust Company to the original bill in this case, marked exhibit B. The said stock certificate of the Duquesne National Bank of Pittsburgh showed on its face that D. L. Patterson was the owner of said stock, and the blank power of attorney printed on the back thereof, dated February 28, 1878, and the blanks left for the insertion of the name of an attorney upon the transfer thereof are unfilled, and the blank assignment and power of attorney to transfer said stock, dated August 26, 1905, was not filled out by the insertion of any attorney or transferee.

3. At the time said loan was made by said Guarantee Title and Trust Company to said Cook, said Guarantee Title and Trust Company did not specially inquire as to whether or not said Cook was the real owner of said stock or bonds, nor did said trust company inquire of said D. L. Patterson whether or not he had sold, transferred or delivered said stock to said Cook for any purpose whatever, but said Cook represented to said Guarantee Title and Trust Company that he was the owner of the securties.

4. After the failure of the Enterprise National Bank and the suicide of its cashier,

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Clark, the Guarantee Title and Trust Company demanded payment of the note made by said Cook, and in default thereof sold and disposed of said three bonds of said Arkansas Water Company and applied the proceeds thereof in part payment of said note, leaving a balance due thereon amounting to $2,545.92, with interest thereon from November 1, 1905.

5. The certificate of stock of the Duquesne National Bank in question in this case, was pledged to the Enterprise National Bank of Allegheny as collateral security and it does not appear that Clark, the cashier, had possession of said certificate or that it was especially intrusted to him for any other purpose, and the evidence does not show that Clark was authorized to deal with this certificate of stock otherwise than for the purpose of keeping same safe in the vaults of the bank; and no circumstances are shown which would have authorized the Enterprise National Bank to sell or dispose of said stock at the time when the same was fraudutently disposed of by said Clark; and under the evidence it appears that when Clark was negotiating with Cook for the disposal of this certificate, he appropriated it and acted for himself and not for said bank, and in said Cook's presence said Clark took said certificate out of the vault of the bank and handed it to said Cook.

6. At the time defendant Cook was negotiating for a loan from the Guarantee Title and Trust Company, on the pledge of the certificate of the Duquesne National Bank stock in question in this case, the said trust company agreed to make said loan only on condition that said Cook would procure a new assignment and power of attorney to transfer said stock; and the officer of said trust company then procured the blank printed assignment and power of attorney exhibit 'C annexed to the answer of the Guarantee Title and Trust Company to the original bill, and filled in said blank form of assignment, "the undersigned" and the description of the stock certificate in question here, and delivered the same, with the other blanks unfilled, to said Cook. Cook then notified T. Lee Clark, at the Enterprise National Bank, that he must have a new assignment and power of attorney to transfer said stock, and sent to said Clark said blank form of assignment which had been delivered to him by the trust company, and requested Clark to procure the same to be executed and delivered to the Guarantee Title and Trust Company. Clark then dated said blank form of assignment and procured D. L. Patterson to sign the same on the false representation that the Enterprise National Bank required it; and said Clark then sent said blank form of assignment by the messenger of the Enterprise National Bank to the Guarantee Title and Trust Company. Said trust company did not inquire of D. L. Patterson whether or not he had sold, transferred or delivered said stock certificate to said Cook for any purpose whatever, nor did it make any inquiry from the Enterprise National Bank. or any of its officers, for any explanation as to why the new power of attorney, executed by D. L. Patterson August 26, 1905, should be delivered to said trust company by said messenger of said Enterprise National Bank; nor did said trust company make any inquiries from said Cook as to what title, if any, he had in said certificate. Nor was this necessary, as the transaction was in accordance with the universal custom in banking business. It does not appear from the testimony that the said Guarantee Title and Trust Company had any notice or knowledge that the said new power of attorney was delivered to it by the messenger of the Enterprise National Bank.

7. On or about August 23, 1905, Lemert S. Cook applied to the Guarantee Title and Trust Company, a corporation organized under the laws of Pennsylvania, for a loan of between five and six thousand dollars, with fifteen shares of the Duquesne National Bank and three Arkansas Water Company bonds of $1,000 each as collateral. The shares of the Duquesne National Bank were in one certificate, No. 14, which was in the name of D. L. Patterson, and on the back of it was printed a transfer and power of attorney which was in the usual form, which was not filled out but was signed by D. L. Patterson and dated February 28, 1878. This stock, at the time it was offered as collateral, was of the value of about $280 per share. The Arkansas Water Company bonds were worth about par at the time they were offered as collateral, and were afterwards sold (November 2, 1905,) at ninety-nine dollars on the hundred, one dollar being charged by the company which made the sale as commission. These bonds were payable to bearer and were transferred by delivery. Mr. Phillips, the vice president and treasurer of the Guarantee Title and Trust Company, to whom application was made for the loan, objected to the transfer and power of attor-

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ney on the back of the certificate of the Duquesne National Bank stock because of its date, February 28, 1878, saying that he believed it was all right, but suggested to Mr. Cook that he have the stock transferred to himself on the books of the Duquesne National Bank. Mr. Cook said he did not want to do that because he did not expect to keep it, that he expected to "turn" it or make sale of it soon after that, and for that reason he did not want to have it transferred to himself. Mr. Phillips then said he would not make the loan unless Mr. Cook got a new transfer and irrevocable power of attorney, and asked him to get it. A new transfer and irrevocable power of attorney was then filled out by Mr. Dunbar, secretary of the Guarantee Title and Trust Company, and handed to Mr. Cook and he took it away with him. Subsequently, it was returned to the Guarantee Title and Trust Company, duly signed by D. L. Patterson, and on August 26, 1905, a demand collateral loan of $5,500 was then made by the said Lemert S. Cook with the said Duquesne National Bank stock and three Arkansas Water Company bonds as collateral, and the proceeds of the loan were credited to Cook's account. The transaction was in accordance with the well established and recognized custom in banking business.

8. A few days after the death of T. Lee Clark, the cashier of the Enterprise National Bank, and after that bank went into the hands of the receiver, Mr. Cook called upon the Guarantee Title and Trust Company to have the stock of the Duquesne National Bank transferred to him. He was informed by Mr. Dunbar, the secretary of the Guarantee Title and Trust Company, that he would have to write them a letter requesting that the stock be transferred, and that he would have to leave with them an irrevocable power of attorney, signed by himself. Mr. Cook did not write such letter, nor did he give the Guarantee Title and Trust Company a transfer in blank, with irrevocable power of attorney; but telephoned to Mr. Dunbar, insisting that the stock be transferred to him. Mr. Dunbar told Mr. Phillips of this, and finally Mr. Phillips told Mr. Dunbar to have the transfer made, but to have it made to the Guarantee Title and Trust Company for its protection, it having made the loan and having no transfer and power of attorney from Cook. Mr. Dunbar then, by letter of October 26, 1905, which letter he presented in person to Mr. Patterson, cashier of the Duquesne National Bank, requested the transfer to be made to the Guarantee Title and Trust Company. Mr. Patterson refused to make the transfer, saying he had been notified by telephone not to transfer said stock. This was on the day preceding the filing of this bill.

9. That the said Guarantee Title and Trust Company is a pledgee of the said stock and the said bonds for value in good faith, and without notice of the title and rights of the Enterprise National Bank of Allegheny and of D. L. Patterson thereto.

10. At the time T. Lee Clark delivered the certificate of stock and bonds in question in this case to Lemert S. Cook in August, 1905, said Cook had sufficient knowledge or information arising out of his relations with said Clark and the previous course of dealings between said Clark and Cook, to make it is duty to inquire from D. L. Patterson or the officers of the Enterprise National Bank as to the right or title said Clark had to dispose of said securities; and if said Cook had performed his duty to make such inquiry, he would have learned that said Clark had no authority to dispose of the certificate of stock of said D. L. Patterson. And therefore the court finds that said Cook was not a purchaser for value in good faith and without notice of the title and rights of said Enterprise National Bank of Allegheny and of D. L. Patterson to the stock certificate and bonds in question in this case.

CONCLUSIONS OF LAW.

1. The Guarantee Title and Trust Company is a pledgee of the fifteen shares of the Duquesne National Bank stock and the three Arkansas Water Company bonds, in good faith, for value, and without notice that the Enterprise National Bank claimed to be the pledgee of them or that Lemert S. Cook was not the owner of them.

2. The Arkansas Water Company bonds were not embraced in or bound by the restraining order, and were sold by the Guarantee Title and Trust Company before the filing of a cross bill, as it had a right to do; and so far as the Guarantee Title and Trust Company is concerned, both the original bill and cross bill must be dismissed.

3. That Lemert S. Cook was not a bona fide purchaser for value, without notice, of the rights of the Enterprise National Bank of Allegheny or of D. L. Patterson, of, in and to the stack of the Duquesne National Bank and the Arkansas Water Company bonds in question in this case, and that he

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acquired no title thereto as against the said Enterprise National Bank of Allegheny and the said D. L. Patterson.

4 That a decree should be entered enjoining and restraining the said Lembert S. Cook from selling or disposing of the said certificate of stock and said water bonds, and directing him to surrender and deliver the same to the receiver of the Enterprise National Bank of Allegheny.

5. That the said Thomas Rinaker, receiver of the Enterprise National Bank, is entitled to a decree adjudging that he, as receiver, is entitled to the said stock and bonds as pledgee thereof, subject to the loan of said Guarantee Title and Trust Company, for the payment of the balance of said debt of said Lemert S. Cook due to it; and that upon the payment by said receiver to said trust company of the balance of said debt, namely, $2,545.92, with interest thereon from November 1, 1905, then said trust company shall deliver said certificate and the blank endorsement thereon to said receiver.

6. The said receiver of the said Enterprise National Bank is entitled to recover the certificate of stoc k of the Duquesne National Bank, now in the custody of the Guarantee Title and Trust Company, on payment of the balance of the debt for which said certificate was pledged to said trust company.

Let a decree be drawn in accordance herewith.

All findings and conclusions requested by the parties to this bill not consistent with the foregoing are hereby refused.

For plaintiff, *Lyon, McKee & Mitchell.*

For L. S. Cook, *Clark D. Beggs* and *A. M. Imbrie.*

For trust company, *Wm. W. Wishart.*

For receiver, *McCleave & Wevdt.*

Book Notice.

RULES REGULATING THE PRACTICE OF THE STATE AND FEDERAL COURTS SITTING AT PITTSBURGH, AND OF THE COURTS HAVING JURISDICTION OF APPEALS THEREFROM, and of the departments of the State and Federal Governments, together with an Index to the Special Acts of Assembly in force in Allegheny County, Etc. Compiled by PERCIVAL G. DIGBY, Librarian of the Allegheny County Law Library, Pittsburgh, Pennsylvania, 1906.

The last published Book of Rules for use in Allegheny county was issued in 1878, with a supplement published by Mr. Digby in 1889. Since the original book was issued the rules of our courts have been greatly enlarged and changed. The Bankruptcy Act has been in force, and a number of new courts have been created. Probably there is no work for which there has been a more imperative necessity than a new book of the rules of court, and we believe that no one is better fitted to compile such a work than our universally esteemed law librarian. Mr. Digby has been engaged for several years in compiling the various rules, and has spent an immense amount of time and painstaking labor in getting the material together, and seeing that it is absolutely correct. Besides the rules of our county courts, the book contains the rules of the Pennsylvania Supreme and Superior courts and the Pennsylvania Equity rules; Practice and Forms in Appeals from the Supreme Court of Pennsylvania to the Supreme Court of the United States; rules of all the departments at Harrisburg, including the Board of Pardons; rules of the Circuit and District Courts of the United States for the Western District of Pennsylvania; also of the United States Circuit Court of Appeals for the Third District; the special rules in bankruptcy of the United States District Court for the Western District of Pennsylvania and the rules of the Referee in bankruptcy; the United States Supreme Court rules in general, as well as those of practice in Admiralty and Maritime jurisdiction and in Equity. The Bankruptcy Act of 1898 is given in full, together with general orders and forms in bankruptcy. Besides those mentioned, there are given the forms of practice and procedure in all classes of matters which the practicing lawyer of Allegheny county is likely to require. There is an index and complete list of all of the special statutes relating to Allegheny county. At the end of the book are the rules of the United States Court of Claims; rules of the Interstate Commerce Commission, and rules governing the granting and issuing of passports.

The work is supplemented with copious notes of explanations and of reference to decided cases construing the various rules. The book is extremely well compiled, the subjects placed in good order, and an excellent index at the end of each set of rules. For the most part the work has received the sanction and approval of the judges of the different courts concerned, as well as the heads of the departments which are included. It will be recognized as the standard authority in all proceedings.

Mr. Digby has placed his work for sale in the hands of J. Oscar Emrich, 426 Bakewell Building, Pittsburgh. Price, $10.00.

A rule of a school board forbidding pupils to play football under the auspices of the school is held, in Kinzer v. Toms (Iowa) 3 L. R. A. (N. S.) 496, not to be unreasonable or in excess of the authority of the board, although applied to conduct on holidays and away from the school grounds.

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The rest of this book is mispaged

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PITTSBURGH, PA., DECEMBER 5, 1906.

Court of Common Pleas No. 1,

ALLEGHENY COUNTY.

United States for Use of Lynch v. Hingston and Phil (principals) and the U. S. Fidelity and Guaranty Co. (surety.)

Action on bond—Demurrer by surety—Act of Congress of August 13, 1894.

The act of Congress approved August 13, 1894, provides that the condition of the bond to be given by contractors for government work shall be that the " . . . contractors shall promptly make payment to the person . . . supplying . . . them with labor or materials in the prosecution of the work provided for in such contract."

In compliance with said act, Hingston and Phil, as contractors, for work on the Herr Island lock and dam, and the U. S. Fidelity and Guaranty Co. (surety) executed a bond.

Lynch rented the contractors a barge for use in the prosecution of the work. Held, sustaining demurrer filed by the surety, that Lynch's claim was not within the class of claims covered by the act of Congress.

No. 125 September Term, 1906. In re demurrer to plaintiff's statement of claim.

Opinion by BROWN, P. J. Filed November 9, 1906.

To the plaintiff's statement of claim in this action upon the bond hereinafter referred to, the United States Fidelity and Guaranty Company (one of the defendants) filed a demurrer, assigning (inter alia) in support thereof:

"First. Said statement does not disclose any right of action against the defendant."

Upon this ground alone our decision upon the demurrer will rest.

In May, 1900, Hingston and Phil, as principal contractors, and the United States Fidelity and Guaranty Company, as surety, executed to the United States of America a bond, upon which this action was brought, (a) for the faithful performance of Hingston and Phil's contract for "building cofferdam, foundation, piers and abutment for part movable dam, and guide cribs, and erecting Chanoine wickets at Herr Island lock and dam, Allegheny river, Pa.," and (b) "for the full payment to all persons supplying them labor or materials in the prosecution of the work provided for in said contract."

The bond was given in compliance with the requirements of the act of Congress, approved August 13, 1894.

In his statement of claim Fred P. Lynch, the plaintiff, avers that he supplied Hingston and Phil with labor and materials in the prosecution of the work under the following circumstances: that on the 7th of January, 1901, at their request he rented them for use in the prosecution of the work a barge, for which they agreed to pay him $3 per day as long as they used the same. That they so used the barge for conveying and storing materials, and for other purposes, in and about the work from January 7, 1901, to October 27, 1901,—294 days. Upon which rental contract he received from the contractors $225, leaving unpaid $657 with interest from said last mentioned date.

Is the plaintiff's claim within the meaning of said act of Congress under which the bond was given? Clearly it is not.

The act of Congress of 1894 provides that the condition of the bond shall be that the " . . . contractors shall promptly make payment to the person . . . supplying . . . them with labor or materials in the prosecution of the work provided for in such contract."

The surety's liability arises only where the contractors fail to pay persons supplying them labor or materials *used in the prosecution of the work provided for in the contract.*

In determining the scope and meaning of the congressional act of 1894 the courts have drawn a clear distinction between labor and materials which enter into the construction of the work, and labor and materials *in the nature of tools and appliances to be used by the contractor for his convenience in the performance*

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of his contract: United States v. *Morgan*, 111 Fed. Rep. 474. This was an action of debt on a bond for the performance of Morgan's contract to supply material and do work on fortifications to be constructed by the United States on Diamond Island, near Portland, Me. Among the findings of fact by the court were the following:

"(8) Morgan had a steam launch expressly constructed for and used by him in transporting merchandise to be used in the work contracted for by him. For tackle, apparel and furniture in fitting out and equipping this steam launch the plaintiff performed work and furnished material to the fair amount of $15.29.

"(9) For the construction of dump cars, skips, grout tubs and conveyors constructed for the prosecution of said contract, and actually used at Diamond Island in making the excavations called for by the contract of Morgan, and conveying the materials excavated, the plaintiff demands $769.07. The rate of charges is fair and right, and the items of the charges are correct, and were actually furnished to the contractor."

In the conclusions of law the court finds, inter alia:

"(D) The charges of $15.29 under finding No. 8 do not come within the provisions of the act of Congress or of the bond, and are not recoverable in this action.

"(E) The items under finding No. 9 are not recoverable. They did not enter into the construction of the public work, but were in the nature of tools and appliances to be used by the contractor for his own convenience and advantage in his execution of his contract."

A barge is as much a part of the contractor's outfit in the building of a cofferdam, piers and abutments, as is a hoisting engine or a block-and-tackle. The act contemplates a right of action in those only who furnish labor and material *consumed in the work*, and does not protect those who furnish the contractor's equipment and tools: *American Surety Company* v. *Lawrenceville Cement Company*, 110 Fed. Rep. 717. Putnam, J., delivering the opinion in this case, says:

"The underlying principle which has governed him (the master) is correct, in that he *has discriminated between labor and materials consumed in the work, or in connection therewith, and labor and materials made use of in furnishing the so-called contractor's plant, and available not only for this but for other work.* This principle was applied by the circuit court for this district in disposing of the common-law suit of Thomas Laughlin Company against Morgan and this complainant, based on the same claims of that corporation which are brought before us by the master's report, as appears by the opinion of Judge Webb, filed in that suit on September 15, 1900. 111 Fed. Rep.—. That decision is, of course, binding on us in this cause; but, in addition thereto, we approve the principle on which it rested, and which, as we have said, was adopted by the master as the basis of the leading principle of discrimination which he has applied in disposing of the claims covered by his report. The necessity of the application of this principle of discrimination becomes at once apparent when we consider the rule of proportion; otherwise a bond given under the statute with reference to a small contract for dredging might be substantially exhausted in protecting the purchase money of an expensive dredge, bought at the particular time of the dredging in question, but useful for continuous dredging to an indefinite amount under other contracts and at other localities. However, this principle of discrimination is so strongly entrenched in the practical rule properly applicable to the construction of this statute that it needs no further exposition."

Being clearly of opinion that plaintiff's claim is not within the class of claims covered by the act of Congress under which the bond was given—upon that ground alone we sustain the demurrer filed by the United States Fidelity and Guaranty Company.

For plaintiff, *H. S. McKinley.*

For surety, *Stonecipher & Ralston.*

Court of Common Pleas No. 2,

ALLEGHENY COUNTY.

BROWN-HUTCHISON COMPANY v. CRONIN.

Lease—Subletting—Consent of owner—Breach of lease—Failure of tenant to make repairs—

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Judgment by landlord—Opening of—Jury trial.

A stipulation in a written lease against sub-letting may be waived by oral agreement of the original parties, and a subsequent owner cannot enter judgment on the lease because of its breach where the evidence shows conclusively the waiver, until at least the agreement to waive has been revoked.

Judgment entered on a written lease by the vendee of the original owner against the tenant for failure to keep a window in repair in violation of the lease which provided that the tenant make all necessary repairs, will be opened where it appears to be doubtful whether the repairs were necessary to the extent of justifying a forfeiture. In such a case judgment will be opened for the purpose of submitting the question to a jury to pass upon.

No. 1100 January Term, 1906. Sur rule to show cause why judgmcnt should not be opened.

Opinion by FRAZER, P. J. Filed March 6, 1906.

On December 9, 1904, W. E. Hammett, being the owner of the premises, Nos. 710 and 712 Wood street, Wilkinsburg, leased the same to defendant for the term of three years and three months from January 1, 1905. Defendant took possession under that lease, which is in writing and in the usual form, and provides among other things that the premises are to be used as a billiard and pool room and are not to be sublet except with the consent of the lessor, which consent shall be in writing. It is also provided that the lessee shall make all necessary repairs.

About September 1, 1905, Hammett sold and conveyed the premises to the Brown-Hutchison Company, and also assigned the Cronin lease to it. After the Brown-Hutchison Company became the owner of the property, Cronin on December 12th sublet temporarily a portion of the main room to Louis P. Nagel for the purpose of exhibiting and selling a line of Christmas toys and decorations. The period of Nagel's occupancy extended from December 12, 1905, to January 1, 1906. The judgment in this case was entered upon the lease of Hammett to Cronin, the breaches alleged upon the part of Cronin being, first, the subletting to Nagel; and second, the failure to repair one of the front windows. The testimony taken and submitted shows conclusively that Hammett agreed orally that Cronin should be permitted to sublet the premises. Both Hammett and Cronin testify to this fact and there is no evidence to the contrary. We think Hammett had a right to waive a strict compliance with the terms of the lease upon the part of Cronin, and having done so, the Brown-Hutchison Company, as purchaser of the premises, was bound by that waiver, at least until revoked by them. Therefore, so far as this alleged breach is concerned, the judgment should be opened, if there was no other breach.

As to the second alleged breach, it appears from the testimony that the window was to some extent in need of repair—to what extent and the length of time it has been out of repair are conflicting. While Cronin obligated himself to make all necessary repairs, the question as to whether or not the repair of the window was necessary to such extent as to justify a forfeiting of the lease, is doubtful. While a repair, under the circumstances, was perhaps advisable, the condition of the glass was not such as to prevent an insurance company from insuring the same, it appearing from the testimony that Cronin had the window insured by a plate-glass insurance company. Whether the failure to repair the window was a sufficient breach to justify the forfeiting of the lease, we think, especially in view of the conflicting testimony, is a question that should be passed upon by a jury. Cronin being in possession of the premises, it was the duty of the purchaser to call upon him and ascertain from him the circumstances under which he had possession, and having failed to do so, they are bound by the circumstances under which he held. *Brinser v. Anderson*, 25 Weekly Notes, 38.

And now, March 6, 1906, rule absolute.

SAME v. SAME.

Costs—Exceptions—Witnesses—Failure to subpœna—Costs of process—Server—Commissioner's costs.

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Appeal by plaintiff from taxation of defendant's bill of costs.

Opinion by FRAZER, P. J. Filed May 25, 1906.

This was a rule to show cause why judgment in ejectment entered on a lease for real property should not be opened and defendant let into a defense. Upon hearing, that rule was made absolute, and subsequent thereto defendant filed a bill of costs amounting in the aggregate to $95.76. To that bill exceptions were filed by plaintiff to two items. The first item is the charge made on account of the employment of Howard Ferguson "to make service of a subpoena on L. Nagle, a material witness, to appear before the commissioner to take testimony under said rule, who spent 39 days in diligent search for the said L. Nagle, to-wit, from January 16th to February 23rd, and paid the said Ferguson for his services and costs and expenses the sum of $50." The charge is clearly improper, and should not be allowed. Nagle was not subpoenaed, was not in court, and was not called as a witness. Therefore, defendant should not be required to pay any portion of the expense defendant was put to in endeavoring to find him. The other exception is to the cost for taking testimony for use at the argument of the rule. By agreement of the parties, John D. Evans, Esq., was agreed upon as commissioner to take the testimony of the witnesses on the part of both plaintiff and defendant. Under that agreement 58 pages of testimony was taken at an expense of $38.20. Upon examination of the same, we find that about one-half was taken by plaintiff and the other half by defendant. It therefore seems to us only fair that each party should bear one-half of that expense.

And now, May 25 1906, plaintiff's appeal is sustained to the extent that the charge of $50 for endeavoring to subpoena L. Nagle is disallowed, and to the further extent that the cost of taking the testimony for use on the hearing of the rule should be borne equally by the parties.

For plaintiff, *Chas. K. Robinson.*
For defendant, *Geo. M. Hosack.*

(Common Pleas No. 2, Allegheny Co.)

SPRAGUE ELECTRIC COMPANY v. PERLEY & BROTHER.

Replevin—Affidavit of defense—Set-off.

An affidavit of defense in replevin which sets up a contemporaneous agreement in regard to other articles to be shipped defendant by plaintiff and to be used in connection with the articles replevied and a failure on the part of plaintiff to comply with the agreement whereby damages resulted to defendant is insufficient because an attempt to set up a defense by way of set-off, which cannot be done in replevin. In addition, the damages claimed were remote and speculative and not set out with sufficient definiteness.

Nos. 446 and 482, October Term, 1906.

Opinion by SHAFER J. Filed September 18, 1906.

These cases are founded upon the same contract and the affidavits of defence are substantially the same in each case. The facts appear to be that the plaintiff company furnished to the defendants certain electrical apparatus on a written contract, furnishing the same for a certain sum of money, the title to remain in the plaintiff until all the money should be paid, the plaintiff company agreeing in the written contract to ship the apparatus described within days from receipt of the agreement duly accepted. The first case above mentioned is a replevin for the apparatus furnished under this contract upon the allegation that the money was not paid. The other action is for additional electrical apparatus sold by the plaintiff to the defendant. The affidavit of defence in each case sets up a contemporaneous parole agreement that the apparatus and equipment to be furnished under the written contract was to be furnished within eight days after notification from the defendant to ship and deliver the same, and that the apparatus first shipped on March 15, 1906, did not correspond and were not made to suit each other, and that the shipment waa not made at the time specified in the contract. It is not alleged when the defendant notified the plaintiff to ship and deliver the goods and therefore it does not appear how much delay, if any, there was in the shipment. It is then

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averred that the delay in the delivery of the apparatus resulted in a loss of $3,000 to the defendant by reason of their inability to fill orders to their customers and because they had to pay wages to employes who were not able to work by reason of the non-delivery of the apparatus. As to the replevin suit, this is an attempt to set up a defence by way of set-off, which cannot be done in such an action, and as to both cases the damages claimed are too remote and speculative, are not set out with sufficient definiteness, and the delay which is said to have occasioned them is not set out at all. We are of opinion that the affidavit in each case is insufficient to prevent judgment.

The rule is therefore made absolute in each case.

For plaintiff, *G. K. Wright.*

For defendants, *Josiah Cohen.*

(Common Pleas No. 2, Allegheny Co.)

SCHAFER v. STEWART.

Affidavit of defense—Promissory note—Violation of guaranty—Subsequent promises.

An affidavit of defense to a promissory note given in payment for certain machinery alleged defects in the machinery. The defects arose prior to giving the note, and there was no allegation of a promise to repair at the time the note was given. Held, that the affidavit of defense was insufficient.

No. 794 January Term 1906. Sur rule for judgment for want of sufficient affidavit of defense.

Opinion by SHAFER, J. Filed May 18, 1906.

The statement is upon a promissory note made by the defendant to the plaintiff, August 28th, 1905, at ten days after date. The affidavit of defense alleges that in July or August, 1904, the defendant purchased from the plaintiff a heater with a guaranty against defects for one year; that in December, 1904, certain parts became defective; that the defendant called upon the plaintiff to remedy them, which he neglected to do; that the plaintiff is the only person through whom these parts can be procured; that they would cost $35, and that by reason of the neglect of plaintiff to put in the parts and his inability to get them from other persons, the heater has been depreciated in value $100. As the note was given long after this occurrence, it would not seem in itself to constitute any defense to the note. The defendant says in regard to this feature of the case that the note sued upon is a renewal of a note given by him at the time of the purchase of the heater, and that the same was reduced from time to time to the sum of $167.85, upon repeated promises made to plaintiff that defendant would remedy the defects. It is not alleged, however, that any such promises were made at the time of the giving of the note, and for anything that appears they may have been made long before.

We are of opinion, therefore, that the affidavit is insufficient to prevent judgment.

For plaintiff, *Stonecipher & Ralston.*

For defendant, *Crumrine & Patterson.*

Court of Common Pleas No. 3,

ALLEGHENY COUNTY.

HOUSTON v. CENTRAL BOARD OF EDUCATION OF PITTSBURGH.

Schools—Central Board of Education—Sub commission—Powers—Act of February 12, 1869, P. L. 150.

The act of February 12, 1869, P. L. 150, creating the Central Board of Education in Pittsburgh authorized it to fix and pay the salaries of teachers, but the appointment and dismissal o the teachers was left to the sub-district boards. The Central Board appointed a commission on a salary with power to fix standards as to teachers and enroll teachers in different classes at fixed salaries for each class. A taxpayer filed a bill to restrain the board from maintaining the commission. Held,

The creation and maintenance of the commission on salary was unlawful, as it was not authorized by the act.

The Central Board could not delegate the authority to fix salaries.

The fixing of salaries in the manner above mentioned was an interference with the right of the sub-district board to appoint the teachers and was therefore unlawful and void.

No. 183 May Term, 1906.

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Opinion by EVANS, J. Filed July 7, 1906.

The plaintiff, a taxpayer of the city of Pittsburgh, files this bill against the Central Board of Education of the city of Pittsburgh, alleging that in the appointment of a commission known as the Teachers' Salary Commission and the maintenance of said commission and the payment of salaries of certain of the teachers of the said districts of the city of Pittsburgh in accordance with the recommendation of said commission the defendant has transcended its authority, and asking that it be restrained in the premises.

FINDINGS OF FACT.

The facts in this case are not in dispute. There was no testimony taken at the trial of the case, and all the material allegations of the plaintiff's bill are admitted in the answer, and we have found the undisputed facts in the case by the approval of the requests of the plaintiff for findings of fact and refer to them and to the bill for the facts in the case.

CONCLUSIONS OF LAW.

In the month of December, 1904, the Central Board of Education of the city of Pittsburgh by resolution divided the teachers of the sub-district schools below the eighth grade into two classes, to be known as Class A and Class B, and fixed the salary of Class A at various amounts dependent upon the number of years' experience had by the teacher, making the salary for above seven years' experience $800 per annum, and fixed the salary of the teachers in Class B at $900 per annum. The requisites of enrollment in Class B were, first, "The teacher shall have taught seven annual terms of ten months each; second, they shall hold a permanent certificate issued by the state of Pennsylvania; third, they shall be recommended to the commission by the board of directors of the sub-district in which they are employed at the time of the application, and said recommendation shall have the approval of the principal and shall be endorsed by a commission known as the Teachers' Salary Commission upon an investigation and examination made by it. The above is in substance the acts of the defendant which the plaintiff alleges are illegal.

The defendant is a creature of the legislature, and unless the powers assumed by it in the premises are authorized by the legislature, then it has no right to expend the public money in the furtherance of the object to be obtained by the exercise of these powers. The act of February 12, 1869, P. L. 150, creating the Central Board of Education of the city of Pittsburgh and determining its powers is very specific and goes into detail in fixing the powers of the Central Board, both as respects to the High School and the sub-district schools, and the only power or control which the Central Board of Education may exercise with reference to the teachers of the sub-district schools is found in the 27th section of the act, which provides "That the Central Board shall have power and authority to determine upon the number of teachers to be employed in the sub-district schools, schools for children of color and professors and teachers in the High School, and to fix and pay the salaries of all of said professors and teachers." Another section gives it the power to appoint and to dismiss professors and teachers in the High School, but as to the sub-district schools this authority is given to the local board.

It is under the power to fix and pay the salaries of the teachers of the sub-district schools that the Central Board of Education assumes to maintain the salary commission. The salary commission was appointed by a resolution of the Central Board of Education in the month of December, 1904, and the paragraph which embodies the real work of that commission is as follows: "The commission shall have the following powers and duties: (b) To conduct such investigation at such times and in such manner as may be decided by the commission and as may be deemed necessary that a just conclusion may be reached on the proficiency and progressive spirit of the applicant in her profession." It will be observed that there is no standard fixed by the school board, the attainment of which will determine the question of the salary to be paid to the teacher. There is no direction as to the manner in which the examination of the teacher in order to determine her proficiency and progressive spirit is to be conducted. The entire matter is left to the discretion of the

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commission created by the Central Board of Education, without a rule to guide them or to bind them, and the report of the commission is final and conclusive both upon the applicant and the Central Board.

Paragraph (c) of the powers of the commission is, "To report to the various sub-district boards from whose corps of teachers applications have been received, the names of the teachers who have been enrolled in Class B;" paragraph (d), "To report to the secretary of the Central Board of Education before the 15th of September in each year the names of such teachers as have been enrolled in Class B during the year." It will be observed that the commission enrolls the teachers in Class B and Class A without reference to the will of the local board or of the Central Board, without consulting either, and simply reports the result of its conclusion to those boards. The fixing of the salaries of teachers on the basis of the report of this commission is certainly the fixing of those salaries by proxy, which was condemned by the Supreme Court of our state in *Delano Land Company's Appeal*, 103 Pa. 347. Mr. Justice Trunkey in delivering the opinion of the court, said: "Doubtless the directors believed it for the interest of the district to employ Noonan to perform many of their own duties and some of the duties of the county superintendent, in relation to the fifteen schools widely scattered over a large township. The directors honestly arranged to supervise, grade and visit the schools by proxy. But their good faith does not stand as authority for employing a superintendent for the district. The provisions of the law may be inadequate to the needs of the district because the county superintendent has too much to do, and the directors are indisposed to do all that is required of them. If so, the power that made the law alone can remedy its defects." We think the decision of that case governs this one. The power to fix the salaries is in the Central Board of Education. It has a discretion which must be exercised by it and cannot be delegated to a commission, and the payment of salaries to this commission and the expenses of its maintenance and operation and the payment of salaries based upon the report made by it, are without the power of the Central Board and contrary to law. The the board of directors of the sub-district schools is given the power to elect the teachers, to supervise their conduct during their incumbency, and to discharge them for reasons specified in the act of assembly. Necessarily connected with these powers is the duty to pass upon their qualifications as teachers before their election, the efficiency of their work during their incumbency and their term of service in the sub-district schools. All these are given necessarily to the directors of the sub-district schools; none of them are given to the Central Board of Education. If we then give to the Central Board of Education power to fix the salary dependent upon its judgment of the qualifications of the individual teachers, we take away from the directors of the sub-district schools the gist of their supervision over the individual teachers and their determination of their qualifications and efficiency. Of what good would be the power to elect a teacher by the directors of the sub-district schools if the Central Board of Education might determine that that teacher was unfit for the position and fix her salary at such an inadequate amount that she could not afford to accept the position?

It was not intended by the legislature that the power to fix the salaries of the teachers of the sub-district schools should thus interfere with the powers and duties of the sub-district board; but the evident intention is to fix such a schedule of salaries that the directors of the various sub-districts may know from their examination of the qualifications of the teacher, her experience, her probable efficiency in the school, the position to which they would elect her, the exact salary which she shall get upon the assumption of her duties. And this is the interpretation which the Central Board of Education has placed upon the authority given it to fix salaries from its creation up until December, 1904, and it was in pursuance of this interpretation of the act of assembly that it fixed the salaries of the teachers of the sub-district schools.

First. The plaintiff has standing to maintain this bill.

Second. The creation and maintenance

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of the commission known as the Teachers' Salary Commission by the defendant is without authority of law.

Third. The payment of salaries and expenses of said commission by the defendant was unlawful.

Fourth. The fixing of the salaries by the defendant of the teachers of the sub-district schools below the eighth grade and above seven years' experience in accordance with the resolution of December, 1904, was not an exercise of the power given to it to fix the salaries of the teachers of the sub-district schools, and was therefore unlawful and void.

Opinion on exceptions filed September 14, 1906.

The exception of the plaintiff to the finding of fact, namely, the failure of the court to affirm the plaintiff's sixth request for finding of fact, is sustained; and the five exceptions filed on behalf of the defendant to the conclusions of law of the court are dismissed.

For plaintiff, *Patterson; Sterrett & Acheson.*

For defendant, *W. B. Rodgers* and *W. J. Brennen.*

Orphans' Court,

ALLEGHENY COUNTY.

In re Estate of DAVID H. LYNCH, Deceased.

Evidence—Joint obligors.

Attesting witnesses must be called unless unavailable, and then having shown that the witness is dead or beyond the jurisdiction of the court, the party offering the writing must prove the handwriting of the attesting witness or show that this was impossible.

L executed a note with R as joint-maker, on the hearing of a claim presented against L's estate in the note; R having been released from liability to the estate. Held, that he was a competent witness for the estate.

Where a party to a contract is dead, the disqualification of a surviving or remaining party as a witness depends not only on the fact of being a surviving party but having also an adverse interest.

No. 74 September Term, 1906.

Opinion by OVER, J. Filed November 2, 1906.

The executor of R. S. Robinson, deceased, has presented a claim against this estate on a note with warrant of attorney to confess judgment, dated December 8th 1899, for $17,460.00, payable to the order of R. S. Robinson, one day after date, and purporting to be signed and sealed by D. H. Lynch, the decedent, and C. M. Robinson, and witnessed by C. Bell. The claimant proved the death of the subscribing witness and the signature of D. H. Lynch; but did not offer to prove the signature of the subscribing witness, nor show that it was impossible to prove it, and the note was received in evidence subject to the objection that its execution was not properly proven.

The rule in regard to proof of a paper having an attesting witness is thus stated in Greenleaf on Evidence, Vol. 1, Sec. 569, page 708, "Attesting witnesses must be called unless unavailable, and then having shown that the witness is dead, or beyond the jurisdiction of the court, the party offering the writing must prove the handwriting of the attesting witness or show that this was impossible after diligent search for the witness." Although in *Clark* v. *Sanderson*, 3 Binney 192, both Tilghan, C. J., and Breckenridge, J., said that proof of the signature of the obligor is more convincing evidence of the execution than proof of the attesting witness' signature, yet they felt bound by the rule as stated in Greenleaf and followed it, and no case has been cited in our state which has departed from the rule. If, then, this rule be in force as it was not shown that it was impossible to prove the attesting witness' signature, the execution of the note was not properly proven and it should not have been admitted in evidence. The objection, however, is technical, and an opportunity should be given to the claimant to supplement his proof were it not that the claim is a stale one, and we think under the evidence offered by the accountant should not be allowed.

The other maker of the note, C. M. Robinson, is a son of the payee of the note. He was called to testify under objections to his competency that it was given to secure the payee from loss on endorsements for himself and Lynch, who were partners in the coal business. It was not shown by the claim-

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ant that his decedent had suffered any loss from such endorsement, and if the witness is competent his testimony defeats the claim. The objection to his competency is founded on the fact that he is a party to the instrument, and it is contended that under clause "e," section 5 of the Evidence Act of 1887, he is incompetent. Whilst it is there provided that when a party to a contract is dead no surviving or remaining party to the contract shall be a competent witness, yet it has been held that the disqualification depends not only on the fact of being a remaining party, but having also an adverse interest: *Darragh* v. *Stevenson*, 183 Pa. 397; *Dickson* v. *McGraw*, 151 Pa. 98; and it was not intended by the act to disqualify a witness who would be competent had the act not been passed: *Curry* v. *Curry*, 114 Pa. 367. We think under the law prior to the passage of the act the witness is competent. In *McMurray's Appeal*, 121 Pa. 421, it was held that "Where one party to a contract is dead it is not enough to render a witness incompetent under the act of 1869 to prove the contract that he is directly interested in the question he must also be directly interested in the case before the court." If an adjudication in this case against the claim would bar a recovery if an action were subsequently brought against the witness he would be directly interested in the case and therefore incompent. The proceeding here, however, is in the nature of a proceeding in *rem* against the fund for distribution: *Piper's Estate*, 208 Pa. 636; the decree will only be conclusive as to it, and if the claim be now disallowed the claimant would not thereby be barred from prosecuting his claim in any future distribution of the estate: *Guenther's Appeal*, 4 W. N. C. 41. The disallowance of the claim here would not avail the witness if an action were brought on the note against him: *Cameron* v. *Paul*, 6 Pa. 323, and he is in point of fact testifying against his own interest, as if the claim were allowed and paid in full he would be discharged from all liability to the payee on the note, and if paid in part his liability would be decreased to that extent. *Cameron* v. *Paul*, *supra*, is directly in point; there it was held that "In an action against one of two parties to a joint and several note under seal, a release of all liability from the party sued to the party not sued places the latter in a position of indifference as to the amount to be recovered by the plaintiff and makes him a competent witness for the defendant to prove a partial payment on the sealed note." As the witness here has been released from liability to the estate as co-promisee on the note the objections to his competency are overruled, and the claim is disallowed.

For accountant, *Calhoun & Johnson.*

For claimants, *O'Brien & Ashley* and *I. S. Stentz.*

MINES AND MINERALS. (SURFACE SUPPORT.) W. VA.

A case of unusual interest and one in which the average mind feels inclined to take issue with the decision of the majority and to agree with the dissenting judge is that of Griffin v. Fairmont Coal Co., 53 S. E. Rep. 24. In this case it was held that a deed conveying the coal under a tract of land, together with the right to enter upon and under said land, and to mine and excavate and remove all of it, without a reservation that the grantee must leave coal enough to support the surface in its original position conferred the right on the grantee to remove all of the coal even though by so doing it removed the support of the surface and thereby caused it to fall, The court fortifies its position by holding that deeds conveying coal with rights of removal should be construed in the same way as other written instruments, and that the intention of the parties as manifested by the language used in the deed itself should govern; and also by announcing as a proposition of law that a deed conveying coal under land with a right to enter the same and remove all of it does not impliedly reserve subjacent support to the surface.

In a dissenting opinion, Judge Poffenbarger points out that the majority opinion avowedly disproves and repudiates the principles of law of subjacent and lateral support declared by every American court that has ever applied that law to a deed or contract by which the surface of land has been separated entirely from the underlying coal, as well as the decisions of the English courts. He reviews at length the decisions of the

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English courts and of several American courts, and shows that the decision of the majority is at variance with the principles of law announced by the courts reviewed on this subject. He repudiates the announced doctrine that a conveyance of coal together with the right to mine and remove it does not reserve the right of subjacent support to the grantor retaining the surface; and in this as well as in his other contentions, he appears to be supported by the unquestioned weight of authority.

An interesting side light is thrown on this case by the decisions dealing with ways of necessity. Where a grantor conveys away all of his land except a piece from which he has no way out except over the granted land the law implies a grant back to him from his grantee of a way of necessity. 1 Tiffany Real Property, p. 714 & cas. cit. even though the grantor gives a deed containing general covenants of warranty. Brigham v. Smith, 4 Gray (Mass.) 297.

This doctrine is a recognized exception to the general rule that in construing deeds the intention of the parties as manifested by language used in the deed itself should govern. The exception exists because public policy demands such an implied regrant despite the general words of warranty in the deed. Buss v. Dyer, 125 Mass. 287, 291.—*The Green Bag.*

An exceedingly interesting holding on the question of the admissibility of evidence of experiments is contained in Tackman v. Brotherhood of American Yeomen, 106 Northwestern Reporter, 350. The action was on a mutual benefit certificate, and the association defended on the ground that insured had committed suicide. The only facts shown were that deceased went to his barn to get his team, and in about an hour was found dead, suspended by the neck from a tie strap attached to a bridle hanging on a peg where deceased usually hung his harness. At the trial a witness testified that he had hung a bridle with a tie strap attached on the peg, throwing the tie strap over the peg in the usual manner, so as to leave it hanging down, and by a series of experiments found that, if he walked towards the bridle and stumbled and fell with his head in a loop formed by the strap, it was drawn around his neck in such a way that it caught or drew over itself, and would have choked him had he not regained his balance. The witness was a man of about the same weight and height as deceased, and a number of experiments showed that the result mentioned ensued about three times out of four. This evidence was held to be admissible as throwing light upon the manner in which the death might have occurred.

PRIMARY ELECTION STATUTES. Various provisions of the Illinois primary election law are declared to be unconstitutional in People v. Board of Commissioners of Chicago, 77 Northeastern Reporter, 321. A provision that in a senatorial district, consisting of two counties, not more than two persons political party, that is one candidate for Senator and one for Representative, shall be nominated from any one county, is held in conflict with the constitutional provision merely requiring that Senators and Representatives shall be residents of the district. Other provisions to the effect that in Cook county no party may hold a primary election unless it cast 20 per cent. of the vote at the last election for President, while outside that county a party which cast 10 per cent. may hold a primary election, and that outside of Cook county a person may vote at the primaries by stating his present party affiliations, while in Cook county he cannot so vote if he has voted at the primary election of another party within two years, are declared to be void because special legislation and interferring with the freedom of voters.

Where, at adjudication, a bankrupt is unmarried and not the head of a family, and therefore not entitled to any exemptions, Matter of Fletcher, 16 Am. B. R. 492, holds that his marriage prior to the qualification of the trustee does not entitle him to exemptions out of property, owned by him at adjudication, but which was really in the custody of the bankruptcy court, though in the actual possession of the bankrupt at the time of his marriage, and derived from sources not disclosed in his schedules.

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PITTSBURGH, PA., DECEMBER 12, 1906.

Orphans' Court,

ALLEGHENY COUNTY.

In re Estate of GEORGE T. JACOBY. Deceased.

Distribution—Equalization—Res adjudicata.

Where distribution had been made of securities on an executor's account to one of them as trustee for three distinct trusts, the share of each trust being designated in the decree, but the trustee did not set aside to each trust its share of the securities and filed one account of the income crediting each trust with its proportionate share. Held, on exceptions to the account that the decree in the executor's account was conclusive as to the interest of each trust in the securities and income.

The claim of an institution under the Orphan Relief Trust was disallowed at a former distribution of the income but having qualified at this audit. Held, that it was entitled to share in the fund but not to equalization with other institutions to which prior distributions had been made, as the former decrees were conclusive as to the institutions then entitled to distribution.

No. 337 September Term, 1906.

Opinion by OVER, J. Filed November 2, 1906.

George T. Jacoby, who died testate April 28, 1896, attempted by his will to deprive his widow of any portion of his estate, directed his executors to contest her claim, but was doubtful of the result, and provided that she should "have nothing more than the law will grant her." He then gave l gacies of two thousand dollars, and the balance of his estate to The Safe Deposit & Trust Company, in trust, one-fourth for the children of Mrs. Downs, one-eighth for Ethel Jacoby, and the remaining portion for the "G. T. Jacoby Orphan Relief Fund." The executors were directed to sell testator's securities; but did not do so, and upon the audit of their account August 15, 1899, one-half of the estate then accounted for was distributed in kind to testator's widow and the other half to the trustee, viz: one-fourth thereof in trust for Mrs. Downs' children, one-eighth for Ethel Jacoby, and five-eighths for the "George T. Jacoby Orphan Relief Fund." The trustee did not divide the securities amongst the three trusts; but accounted to each for its proportion of the earnings of the income on the whole, and to this its fourth account of the income exceptions are filed by beneficiaries under the Orphan Relief Fund, in which it is claimed that it was testator's intention to give this trust five-eighths of his whole estate after deducting the legacies and debts, and that as the widow took one-half, the balance should have been distributed to the trustee for the Orphan Relief Fund, and that the beneficiaries thereunder are entitled here to distribution of all the income shown by this account.

Mrs. Downs' children also file exceptions, in which it is claimed that the gift to the "Orphan Relief Fund" abated by the distribution to the widow, that one-half of the fund for distribution after payment of legacies and the widow's share should have been distributed to their trust, one-fourth to Ethel Jacoby and one-fourth to the Orphan Relief Trust, and that the income here for distribution should be distributed to the beneficiaries under the three trusts in this proportion.

The answer to these exceptions is that this is the account of the trustee in which it is charged with the income of a trust fund distributed to it in a definitive decree on an executors' account, in which the interests of the three trusts in the fund is clearly designated. The proper place to have the questions raised by these exceptions adjudicated was on the audit of that account, and that the question of abatement of the trust legacies was there considered is shown by the opinion filed in that adjudication: *Jacoby's Estate*, 47 P. L. J. (O. S.) 64. As we think the exceptants are bound by the decree there made it is not necessary to again pass on the questions raised by the exceptions, and they are dismissed.

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Upon the audit of the first account of the income of the Orphan Relief Trust filed by the trustee, the Curtis Home for Destitute Women and Girls was a claimant, but was not allowed to participate in the distribution because the care of orphans was not germane to the purposes of the organization: *Jacoby's Estate*, 51 P. L. J. (O. S.) 77. On December 24, 1904, the charter was amended by changing the name of the institution to the "Curtis Home for Destitute Women and Children," and making one of its purposes "the care of destitute orphans or neglected children." As there are orphan children in the institution, cared for by it, and this is one of the purposes of the charity, and it is under Protestant management and the Protestant religion is taught therein, it is now in the class of beneficiaries designated by the testator and entitled to distribution out of this fund.

It is contended, however, that it should be equalized with the other institutions to which distribution has heretofore been made. The beneficiaries designated by the testator of this trust are Protestant orphan asylums and institutions wherein orphans are cared for, and as a condition precedent to distribution to any claimant, he required due proof to be made that "in it is taught the Protestant religion." The orderly and safe way of proceeding by the trustee to give effect to the testator's intention is to file an account annually, so that all claimants on its audit may have the opportunity of furnishing the proof required by the testator, and the institutions entitled to participate in the distribution of the fund may be judicially ascertained. This practice has been followed by the trustee, and there have been heretofore three accounts filed and distribution of the fund made by this court. The claimant, when these adjudications were made, was not within the class of beneficiaries designated by the testator, had no right then to participate in the distribution; but even if it had we think the decrees heretofore made are conclusive as to the fund then distributed. The testator directed that the net income shall be paid to the institutions "share and share alike." This seems to refer to the time of payment, and it is then he provides for equal distribution and not for equalization in future distributions with belated claimants, or those which may then be qualified to participate in the fund. The decree on each account is a judicial ascertainment of the institutions then entitled under the provisions of the testator's will to the fund, and whilst others may qualify in future distributions, they are only entitled to an equal share in the fund then distributed.

The claim for equalization is therefore disallowed.

SAME v. SAME.

Sur exceptions to decree.

Opinion per curiam. Filed December 5, 1906.

The exceptions filed by the Curtis Home for Destitute Women and Children must be dismissed for the following reasons:

1. The decree of this court at No. 102 February Term, 1901, disallowing its claim to participate in the income of the trust fund, unreversed, is conclusive that the exceptant had no right to participate in the fund then distributed, and therefore it has no right to claim equalization on account of the distribution then made.

2. The subsequent decrees of distribution, unreversed, are conclusive as to the institutions then entitled to distribution, and therefore that the exceptant was not then within the class of beneficiaries intended by the testator.

3. Prior to the amendment of the exceptants' charter on September 24, 1904, the care of orphans was merely incidental to the purposes of the organization, and it was therefore not entitled to participate in the prior distributions of the fund, nor to equalization on account of said distributions; and for the further reason that it did not at the audits of the accounts subsequent to the first audit, present a claim, nor comply with the conditions the testator annexed to the gift.

The questions involved in the exceptions of the German Protestant Orphans' Asylum, in which it is claimed that only institutions which are exclusively orphan asylums are within the class of beneficiaries designated by the testator, were raised and discussed

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on the audit of the trustee's first account, and for the reasons there given, *Jacoby's Estate*, 51 P. L. J. (O. S.) 77, the exceptions are dismissed.

As the decree of this court upon the audit of the executor's account, unreversed, is conclusive as to the questions raised by the other exceptions, they are also dismissed.

For accountant, *H. A. Miller*.

For exceptants, *Morton Hunter*, *S. S. Mehard* and *H. F. Ruoff*.

Court of Common Pleas No. 2,

ALLEGHENY COUNTY.

COMMONWEALTH ex rel. LACKOVIC v. JANKOVIC.

Quo warranto—Beneficial society—Removal of treasurer—Discretion of directors.

A meeting of a beneficial society was called for the purpose of determining the guilt or innocence of the treasurer in reference to his accounts, and notice thereof was given the treasurer. At the meeting the treasurer was removed.

Held, on quo warranto proceedings to oust the treasurer that the meeting was regular and the matters decided were in the discretion of the society and not subject to review by the court.

No. 376 April Term, 1906. Quo warranto.

Opinion sur demurrer by FRAZER, P. J. Filed June 28, 1906.

The petition sets out that the National Croatian Society of the United States of America is a corporation duly created and existing under the laws of this commonwealth, and that respondent was at a convention of its members duly held in September, 1904, elected as high treasurer of the corporation, and after having duly qualified has continued to act as such officer. It further appears that on June 6, 1905, the board of trustees of the association called a meeting of the board of directors in accordance with the by-laws, setting forth in the call that the accounts of the respondent as treasurer of the association were irregular, incorrect and false and asking that a meeting be held for the purpose, inter alia, "of determining the guilt or innocence of respondent and take action thereon." In accordance with such request a meeting of the board of directors, of which respondent had due notice in writing, was held at the general office of the corporation in the city of Allegheny, at which more than a majority of the directors were present. Respondent was not present and refused to appear at the meeting. Upon consideration of the charges against respondent the board of directors by a two-thirds vote in the affirmative declared him guilty of the charge of appropriating to his own use without any right or authority whatsoever certain moneys of the association, namely, "divers and many benefits rightly due and owing to certain beneficiaries of said society, which he had been directed as such high treasurer to pay to the proper beneficiaries." Thereupon the board of directors removed and expelled respondent from his office of high treasurer of the society, and upon August 12th elected as his successor in office the relator, Tomo Lackovic, who has duly qualified and has given bond with surety in the sum of $10,000, as required by the society. It is further alleged that respondent, although notified of his expulsion from office, declines to surrender the same and deliver over to the society the money, books and property belonging to the society in his possession as such high treasurer. To the petition respondent makes answer, admitting generally the allegations contained in the petition, but denying any irregularities or shortages in his accounts, and as further answer says, "that respondent, as a banker and forwarding agent, took credit out of certain benefits payable by said society to certain beneficiaries abroad, of certain commissions and fees for negotiating its exchange, all of which are proper and legal, for the retaining of which there is no ground of complaint against respondent." To the answer relator demurred.

The question here is the legality of the society's action in removing respondent from his office of high treasurer. That it had a right to do so for sufficient cause and upon hearing, there can be no doubt. All we can consider here is the legality of the action of the board of directors. The petition alleges malfeasance in office upon the part of the respondent, notice of the charges against him and of the time and place of hearing as

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required by the rules of the society, and his expulsion from office. No complaint is made of the manner of procedure against respondent except that he denies that the call for a meeting of the board of directors "set forth any charge of irregularities or falsifications" in his books or accounts. While the notice, perhaps, in so many words, does not allege shortage and falsification in respondent's accounts, it does allege in detail irregularities and retention by him of moneys belonging to beneficiaries of the society, and notified him of the time and place of the meeting of the board of directors "to determine the guilt or innocence of said Jankovic and take action thereon." This, it seems to us, was a sufficient notice to respondent of the charges against him; and, if he had any answer to make thereto, he should have attended the meeting and made his defense. Not having done so, the proceedings being regular and the charge sufficient for his removal if established, he must abide the result. The defense set up in the answer, that the shortages alleged were not such but were made up of "commissions and fees for negotiating exchange" deducted by respondent from beneficiaries in making payment to them, should have been made to the board of directors to be passed upon by them. Whether the deduction of such moneys and their retention by respondent, who was a salaried officer of the society and whose duty it was to make payment to beneficiaries, was improper, was a question for the directors to first pass upon and determine, and cannot be considered by us in this proceeding. The directors having acted in accordance with the rules and by-laws of the society, and, after hearing, having found respondent guilty of the charges preferred against him, had a right to remove him from office and elect another member in his place, and, having done so, respondent must submit to their action,

And now, June 28, 1906, the demurrer to the answer is sustained and respondent is ousted from his office as high treasurer of the National Croatian Society of the United States of America, and he is further directed forthwith to pay over and deliver to relator all moneys, books and property in his hands as such officer belonging to the society.

For plaintiff, *McCready & Moore.*

For defendant, *W. S. Thomas* and *F. W. Arthur.*

Executive Department,

HARRISBURG.

LEHIGH VALLEY PASSENGER RAILWAY COMPANY.

Corporations—Merger of—Increase of stock and debt—Street railways—Acts of 1874, 1901.

The increase of capital stock and indebtedness of corporations referred to in the act of February 9, 1901, relates to an increase in stock or debt of corporations acting singly and entirely separate and apart from the thought of merger or consolidation. That act can be applicable to mergers and consolidations only in the event of its appearing that there is, in point of fact, an increase in the stock and debt of the consolidated company over and above the stock and debts of the constituent companies.

The act of May 29, 1901, as amended by the act of March, 31, 1905, cannot be construed in any other way than as permitting an increase of stock in the process of consolidation.

Where the aggregate capital stock of the constituent consolidating companies amounted to $6,000,000, and the aggregate debts to $8,900,000, and the stock of the new company was fixed at $8,000,000; and the d fference of $2,000,000 (the difference between the aggregate capital and the new capital) was represented by a corresponding amount of claims against the old companies surrendered in such a manner as to convert the position of creditor into that of stockholder to the extent of the claims surrendered—such change of securities does not, in point of fact, make an increase of stock acquiring a bonus to be paid to the commonwealth.

Request of Governor Pennypacker for opinion.

Opinion by CARSON, Attorney General. Filed November 2, 1905.

I have examined at your request, the agreement of consolidation and merger made under date of Aug. 16, 1905, between the Philadelphia and Lehigh Valley Passenger Railway Company, the Lehigh Valley Passenger Railway Company, The Allentown and Slatington Passenger Railway Company and the Coplay, Egypt and Ironton Street Railway Company.

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Four objections were raised to this agreement:

1. That it was unaccompanied by certificate of the auditor-general as to the filing of reports and payment of taxes. This objection has since been removed by the payment of the taxes and the filing of the reports.

2. That the charters of the constituent companies determined the business and the rights of the new company, and that these should not be stated in the agreement.

Paragraph 7 of the agreement, as presented for your approval, sets forth that "the business of said consolidated company shall be the construction, maintenance and operation of a street railway for public use in the conveyance of passengers by power other than locomotive in and along the routes heretofore occupied by it, and with all the rights, privileges and franchises heretofore vested in each of the consolidating companies, parties hereto, under their respective charters, together with the right of extension therein and elsewhere as may be conferred by law. The length of the road and lines of the consolidated company are approximately 150 miles."

A doubt arose as to whether or not the said clause, by its terms, provided for larger powers on the part of the consolidated company, as regards the mode of conveyance of passengers, than were enjoyed by the consolidating companies under their respective charters because of a limitation of the motor to electricity. To meet this doubt a paper has been presented, to be considered by you as forming part of the agreement of consolidation and merger, by which it is declared, in consideration of the premises, that, for the purpose of more effectually complying with the provisions of the act of assembly, approved May 29, 1901, entitled "An act supplementary to an act entitled 'An act to provide for the incorporation and regulation of certain corporations,'" approved April 29, 1874, it is agreed between and understood by the said consolidating companies that the powers in said seventh clause aforesaid, as regards the mode of conveyance of passengers, are and shall be construed to be only such, and no more, as have been heretofore possessed and enjoyed by said consolidating companies under their respective charters, anything in said clause to the contrary notwithstanding. This paper has been duly signed by the president of each one of the consolidating companies and attested under the corporate seal, and the proper acknowledgments before a notary have in each instance been attached.

While this paper does not in terms disclaim the use or intended use of any other motive power than that of electricity, yet, inasmuch as it provides, upon a fair construction of it, that there shall be no enlargement of the corporate powers of the constituent companies, and that the powers of the consolidated company shall be only such, as regards the mode of conveyance of passengers, as where theretofore possessed and enjoyed by the consolidating companies under their respective charters, and inasmuch as the state could not deprive these companies or the consolidated company of any chartered powers which said companies theretofore possessed, there being no judgment of ouster either on the ground of misuser or non-user, I am of opinion that the paper satisfactorily meets the objection raised. From another point of view, the clause, as explained by the supplementary paper, amounts to mere surplusage.

The third objection was to the effect that there was an increase of capital stock in the sum of $2,000,000 without complying with the provisions of the act of Feb. 9, 1901, and, further, that the provisions as to preferred stock should be eliminated as they were matters of internal regulation with which the state was not concerned.

To avoid repetition in the discussion of this objection, I shall also consider therewith the fourth objection raised to paragraphs 11 and 12, by which it is asserted that there appears to be the creation of a bonded indebtedness without complying with the provisions of the act of Feb. 9, 1901, P. L. 3.

An examination of the papers has satisfied me that the act of Feb. 9, 1901, is inapplicable to the facts of this case. The consolidation is sought to be made entirely under the provisions of the act of May 29, 1901, P. L. 349, and the ground on which the conclusion rests is that the applicability of of the act of Feb. 9, 1901, P. L. 3, turns

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upon the determination as to whether or not there is, as the result of the merger, any actual increase of the capital stock and indebtedness of the corporations merged and consolidated.

The act of Feb. 9, 1901, is entitled "An act to provide for increasing the capital stock and indebtedness of corporations," and it was intended to carry out the provisions of the Constitution in Art. XVI, Sec. 7, which declares that "the stock and indebtedness of corporations shall not be increased except in pusuance of general law, nor without the consent of the persons holding the larger amount in value of the stock first obtained at a meeting to be held after sixty days' notice given in pursuance of law."

An examination of the act of Feb. 9, 1901, satisfies me that the increase of capital stock and indebtedness of corporations therein referred to related to an increase in stock or debt of corporations acting singly and entirely separate and apart from the thought of merger or consolidation. There is not a single section or line of any section in the act which looks toward merger or consolidation.

The act of May 29, 1901, P. L. 349, does relate in specific terms to merger and consolidation. Its title is "An act supplementary to an act entitled 'An act to provide for the incorporation and regulation of certain corporations,' approved April 29, 1874, providing for the merger and consolidation of certain corporations." The provisions of the act are in harmony with the thought of merger and consolidation, section 1 distinctly declaring that it shall be lawful for any corporation, organized under or accepting the provisions of the General Corporation Act of April 29, 1874, or any of its supplements, of any other act of assembly authorizing the formation of corporations, to buy and own the capital stock of, and to merge its corporate rights, powers and privileges with and into those of, any other corporation, so that, by virtue of this act, such corporations may be consolidated, and so that all the property rights, franchises and privileges then by law vested in either of such corporations so merged shall be transferred to and vested in the corporation into which such merger shall be made.

Section 2 provides that the directors of each corporation may enter into a joint agreement, under the corporate seal of each corporation, for the merger and consolidation of said corporation, which agreement shall prescribe the terms and conditions thereof, the mode of carrying the same into effect, together with the name of the new corporation, and a statement of the number and names of the officers, directors and others who shall be the first directors and officers of the new company. The agreement must also specify the number of shares of capital stock, the amount or par value of each share, and the manner of converting the capital stock of each of said corporations into the stock of the new corporation, with such details as shall be deemed necessary to perfect the said consolidation and merger, but the agreement is not to be effective unless the same shall be approved by the stockholders of said corporations in the manner thereinafter provided.

It is further provided that the agreement of consolidation shall be submitted to the stockholders of each of said corporations at separate and special meetings, of the time, place and object of which due notice shall be given by publication once a week for two successive weeks before said respective meetings, in at least one newspaper in the county, or each of the counties in which the principal offices of said respective corporations shall be situate, and at said meetings the agreement of the directors shall be considered, and a vote of the stockholders in person or by proxy shall be taken by ballot for the adoption or rejection of the same, and if a majority in amount of the entire capital stock of each of said corporations shall vote in favor of said agreement, merger or consolidation, then that fact shall be certified by the secretary of each corporation, under the seal thereof, and said certificates, together with the said agreement or a copy thereof, shall be filed in the office of the secretary of the commonwealth, whereupon the said agreement shall de deemed and taken to be the act of consolidation of said corporations.

Section 3 provides that, upon the filing of said certificates and agreement, or copy of agreement, in the office of the secretary of

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the commonwealth, the merger shall be deemed to have taken place, and the corporation to be one corporation under the name adopted in and by said agreement, possessing all the rights, privileges and franchises theretofore vested in each of them, and all of the estate and property, real and personal, and rights of action of each of said corporations shall be deemed to be transferred to and vested in the said new corporation without any further act or deed. This is accompanied by a proviso which saves to creditors all rights and liens upon the property of each of said corporations, so that they shall continue unimpaired, and, to give effect to this provision, preserves the existence of the respective constituent corporations for that purpose, and all debts, duties and liabilities of each of said constituent corporations are thenceforth to attach to the new corporation, to be enforced against it to the same extent and by the same process as if said debts, duties and liabilities had been contracted by it.

This is followed by the declaration that the merger and consolidation shall not be complete, and that no such consolidated corporation shall do any business of any kind until it shall have first obtained from the governor of the commonwealth new letters patent, and shall have paid to the state treasurer a bonus of one third of one per centum upon all its capital stock in excess of the amount of capital stock of the several corporations so consolidating, upon which the bonus required by law had been theretofore paid.

The remaining provisions of the act are immaterial to this discussion.

This act was amended by the act of March 31, 1905, P. L, 95, by adding a proviso that new letters patent of such consolidated corporations shall not be issued by the governor of the commonwealth until there shall have been filed with the secretary of the commonwealth a certificate from the auditor-general of the commonwealth setting forth that all reports required by the auditor-general of the commonwealth have been duly filed and that all taxes due the commonwealth have been paid.

It is under the act of May 29, 1901, and the amending act of March 31, 1905, that this consolidation is sought to be made. I have already pointed out that the act of Feb. 9, 1901, does not relate to mergers or consolidations. It can be applicable only in the event of its appearing that there is, in point of fact, an increase in the stock and debt of the consolidated company over and above the stock and debts of the constituent companies. If no such increase in either or both should appear, then, in my judgment, the act of Feb. 9, 1901, is inapplicable, not only in terms, but in substance; and I am further of opinion that the act of May 29, 1901, is a general law within the meaning of Art. XVI, Section 7, Constitution of Pennsylvania, and that if, in point of fact, it authorizes an increase of stock in a manner somewhat different from the act of Feb. 9, 1901, it must be taken to be a modification or repeal pro tanto of the earlier act. That the act of May 29, 1901, as amended by the act of March 31, 1905, contemplates the possibility of an increase in capital stock as the result of the consolidation appears from the language occurring in both acts, which prescribe, as a prerequisite to the effectiveness and completion of the merger and consolidation, that there shall be paid to the state treasurer a bonus of one third of one per centum on all its corporate stock in excess of the amount of the capital stock of the several corporations so consolidated, upon which the bonus required by law has been therefore paid.

This provision, so far as I can see, cannot be construed in any other way than by permitting an increase of stock in the process of consolidation. It cannot be interpreted to mean an increase by the consolidated company after the merger, because it provides that the merger itself shall not be complete until the bonus is paid; nor can it be interpreted to mean that the constituent companies must increase their stock before consolidating, because it is the stock of the consolidating company, and not of the constituent companies, upon which the act of March 31, 1905, amending section 3 of the act of May 29, 1901, requires the bonus to be paid.

I do not feel called upon to discuss the question whether these words are sufficient in themselves to constitute the right to increase capital stock in a manner different from that prescribed by the act of Feb. 9, 1901, because an analysis of the present plan has convinced me that there is, in point of fact, no increase of stock or indebtedness of the consolidated company to an amount in excess of the stock and debts of the constituent companies; and it follows that, if

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there be no increase of debt or of capital stock as the result of carrying out the plan of merger and consolidation, the act of Feb. 9, 1901, is inapplicable.

What has been done, or rather, what is sought to be done, under the plan now submitted to your approval, is a shifting about and a readjustment of the capital stock and bonded debts and other obligations of the old company in such a manner as to effect a change of securities, and a change in the status of creditors of the corporation in a manner mutually agreeable and satisfactory to all, so as to result in a final creation of a new debt of the consolidated company, less in amount than the debt of the constituent companies; and, moreover, it appears that whatever increase there is in the capital stock is the result of an exchange of the positions of certain creditors of the old companies, so that, by surrendering their claims, they become stockholders in the new corporation, and thus give full value therefor.

The aggregate capital stock of the constituent companies amounted to $6,000,000. The aggregate debts of the constituent companies amount to $8,900,000. By following out the details of the plan stated in the agreement of consolidation and merger, it becomes clear that, while the stock of the new company is fixed at $8,000,000—of which $3,000,000 is common stock and $5,000,000 preferred stock—yet $2,000,000 of this new stock is represented by a corresponding amount of claims against the old companies, surrendered in such a manner as to convert the position of creditor into that of stockholder to the extent of the claims surrendered. In this way the indebtedness of the company is diminished while the stock of the company is increased, but the conversion of creditor into stockholder, so far as the position of the stockholder is concerned, is somewhat the worse, while the position of the company is improved.

It also appears that of the consolidated mortgage bonds of the two issues of 4 and 5 per cent, amounting in the aggregate to $7,500,000, $5,000,000 are reserved for the express purpose of retiring $5,000,000 of first mortgage bonds therein before provided for. Hence, this $5,000,000 of bonds is not to be regarded as an increase of debt, but simple a change of form in the debt itself, without adding to its amount. The plan seeks to make exchanges in such a manner as to get out all the different kinds of stocks and bonds required by the plan, the increase in amount above the aggregate of the bonded stocks and indebtedness of the reorganized companies being no more than sufficient to cover, in addition thereto, the costs and expenses of the forclosure proceedings, and the whole issue of every kind being less in amount than the stocks and indebtedness of the old companies.

On final analysis, therefore, I am satisfied that there is no substantial increase in either stock or bonds unrepresented by value. The value is clearly there. Creditors have surrendered their claims for stocks and consolidated bonds are created for the purpose of retiring old obligations. This feature of the case distinguishes this agreement from the one presented to your consideration in the Bellevue and Perrysville Street Railway Company and the Howard and East Street Railway Company (Opinions of the attorney-general, 1903-04, page 42). [32 Pa. C. C. R. 243.]

I am of opinion further, that the mere statement that the stock proposed to be issued shall consist of three millions of common stock and five millions of preferred stock is not objectionable. True, it is a detail of corporate management, but these details would seem proper to be set forth under the directions prescribed as features of the joint agreement by Sec. 2 of the act of May 29, 1901, which expressly requires that there shall be set forth in the agreement of merger and consolidation the terms and conditions thereof, the mode of carrying the same into effect, and the number of shares of the capital stock, the amount or par value of each, and the manner of converting the capital stock of each of said corporations into the stock of the new corporation. Besides this, it would seem important to advise the public by a statement contained in a paper, which when approved by you, practically acts as a new charter, of the exact number of shares of common stock which are authorized, and of the number of shares of preferred stock which are also authorized. No harm certainly can come from such a notice, and great possible advantage might result.

On the whole, therefore, I am of opinion that the articles are in proper form and should meet with your approval.

From Paul A. Kunkel, Esq., Harrisburg, Pa.

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PITTSBURGH, PA., DECEMBER 19, 1906.

Court of Common Pleas No. 3,

ALLEGHENY COUNTY.

HASLAGE v. RIEGER et al.

Mortgage—Life estate—Remainder—Release of remainder—Fraud.

A, the owner of a life estate in land. and C, the remainderman, joined in a mortgage to B to secure a loan to C. B started to foreclose the mortgage and A notified him she would pay the amount due and expect an assignment of the mortgage, and subsequently did so, but meantime B released C's property from the mortgage. Held, That C being primarily liable the release was a fraud on A and should be cancelled and the mortgage assigned to A.

No. 50 August Term, 1906..

Opinion by EVANS, J. Filed October 6, 1906.

FINDINGS OF FACT.

1. The plaintiff, Caroline Haslage, is the widow of William Haslage, deceased, by whose last will and testament she was devised a life estate in certain real estate situate in the seventh ward of the City of Allegheny and fully described in the second paragraph of plaintiff's bill. On the 21st of December, 1899, she, with Herman C. Haslage, one of the defendants, executed a mortgage to Charles L. Goehring to secure the payment of $3,000 in three years from its date, which mortgage was recorded in mortgage book 898, page 553. The said Herman C. Haslage was the owner of an undivided interest in the said described tract of land, subject to the life estate of the plaintiff, and the mortgage executed to Charles L. Goehring aforesaid was for the benefit of Herman C. Haslage, who received the whole amount of the $3,000, and the plaintiff in joining in said mortgage pledged her life estate in said property as surety for Herman C. Haslage's debt. Said mortgage was assigned by the executor of Charles L. Goehring on the 27th' of May, 1903, to Amelia R. Haslage, who on the 3rd day of January, 1906, assigned the same to Louisa M. Rieger, one of the above defendants; Herman C. Haslage having in the meantime paid $2,000 of the debt aforesaid, leaving a balance of $1,000 with interest due.

2. At No. 412 May Term, 1906, a *scire facias* was issued by the said Louise M. Rieger on the mortgage aforesaid and was so prosecuted that on April 19, 1906, judgment was entered on the same, and on the same day, at No. 136 May Term, 1906 a writ of *levari facias* was issued, upon which writ the sheriff of Allegheny county levied upon the respective interests of Herman C. Haslage and Caroline Haslage in the premises described in paragraph second of plaintiff's bill, and advertised the same for public sale on the seventh of May, 1906.

3. On the 1st day of May, 1906, the plaintiff notified Louise M. Rieger that she, the plaintiff, proposed to pay the amount of said judgment with interest and costs and would thereupon expect to receive from the said Louis M. Rieger an assignment of the said bond, mortgage and judgment in order to permit her, the plaintiff, to receive her proper and equitable right of subrogation against Herman C. Haslage; and on the 4th day of May, 1906, paid to the sheriff of Allegheny county $1,144.76, being the amount of debt, interest and costs due upon the said mortgage.

4. On the 2d day of May, 1906, Louise M. Rieger released from the lien of the mortgage aforesaid all the property of Herman C. Haslage, and said fact was unknown to the plaintiff when she paid to the sheriff the amount of the mortgage as aforesaid.

CONCLUSIONS OF LAW.

As between Herman C. Haslage and the plaintiff, the obligation upon the part of Herman C. Haslage to pay the debt secured by the mortgage was a higher obligation than that on the part of the plaintiff. The mortgage was made for the benefit of Herman C. Haslage; he got the proceeds thereof, and Mrs. Haslage only joined in the mortgage in order that the mortgage might be a

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REGISTER'S NOTICE.

The following Executors, Administrators, Guardians and Trustees have settled their respective accounts in he office of the Register and Clerk of Orphans' Court, and the same will be presented for confirmation to the rphans' Court of Allegheny county, at the Court House Pittsburgh, on

MONDAY, JANUARY 7, 1907.

No,	Estates of	Accountants.	Filed.
2	Terek, Mich	Chisler, Estella M, Administratrix	November 7, 1906
3	Huggins, Eliza	Hervey, W. M. Administrator	November 7 "
4	Miller, Anna Grant	Otten, Susan Tracy, Executrix	November 8 "
5	Shoop, Samuel G	Shaw, David I, Executor	November 8 "
6	Shaner, Annie W	Armstrong, W. A, Administrator	November 8 "
7	Hutchison, J. P	Hutchison, Chas. M, Executor	November 9 "
8	Mahaney, Joseph	Mahaney, James R, Administrator	November 9 "
9	Hofman, Anton	Hofman, Adolph et al, Executors	November 10 "
10	Risher, John C	Risher, John M. et al, Trustees	November 12 "
11	Bedell, A. W	Newton, John A, Executor	November 12 "
12	Falter, Francisca	Opperman, Ferdinand, Executor	November 13 "
13	Burdett, Catherine	Burdett, W. Frank et al, Executors	November 12 "
14	Huhn, Valentine	Peitz, John, Executor	November 13 "
15	Haeppel, Auguste	Haeppel, Wm. R et al, Executors	November 13 "
16	Green, Emma	Sewickley Valley Trust Co, Administrator	November 14 "
17	Ruppert, Clemens	Ruppert, Anton, Executor	November 14 "
18	Snyder, Maria	Burket, Dr. J. H, Executor	November 14 "
19	Michaelofsky, August	Michaelofsky, Geo. V, Administrator	November 14 "
20	Baltensperger, Katherine	Entress, John F, Administrator	November 15 "
21	Irvine, Bessie	Irvine, Agnes, Administratrix	November 15 "
22	Breen, Mathilda	Peoples Trust Co., Administrator	November 15 "
23	Wadsworth, Marian and W. J, Jr	Wadsworth, Walter, Guardian	November 15 "
24	Colteryahn, John L. C	Colteryahn, Wm, Guardian	November 15 "
25	Bauer, Maria	Heilman, Laura et al, Executors	November 16 "
26	Gamble, Thomas B	Gamble, May V, Administratrix	November 16 "
27	Sheppheard, Wm. V	Theobald, C. E, Administrator	November 16 "
28	Cadman, Wm	Cadman, Wm. H, Executor	November 17 "
29	Winkler, Thomas Henry	Winkler, Sarah E, Administratrix	November 17 "
30	Winkler, John Christopher	Winkler, Sarah E, Administratrix	November 17 "
31	Palmer, John C	Eaton, John et al, Executors	November 17 "
32	Holstein, Anna Elizabeth	Macfarlane, James R, Guardian	November 17 "
33	Ward, William	Ward, Louise, Trustee	November 19 "
34	Lowry, Alice M	MacConnell, Robert K. Administrator	November 19 "
35	Purtell, Michael J	Scanlon, Michael J, Guardian	November 19 "
36	Southwell, Wm. H	Southwell, Wm. H, Jr, Administrator	November 19 "
37	Wiesser, John	Linn, Catherine, Executrix	November 20 "
38	Patterson, James S	Hunter, Mary E, Administratrix	November 20 "
39	Beine, August	Liesenjohann, Jos, Executor	November 20 "
40	DeHaven, Harriett A	Shaw, Julia D et al, Executors	November 21 "
41	Kimmel, Alexander C	Kimmel, Laura A Administratrix	November 21 "
42	Smith, George W	Cooper, Chas. W, Executor	November 21 "
43	Trees, Harry	Raynor, Jean Trees, Administratrix	November 21 "
44	Schmid, Bernhard	Schmid, Mark, Executor	November 21 "
45	Morand, Julius	Meinert, D. H, Executor	November 21 "
46	McCracken, John Sr	McCracken, Jos. W, Executor	November 21 "
47	Frauenheim, Mary	Frauenheim, August A, Executor	November 22 "
48	Dunlap, James	Dunlap, James A, Trustee	November 22 "
49	Mason, Theresa	Mason, Michael, Administrator	November 22 "
50	Wier, Ralph	Houston, James W, Guardian	November 22 "
51	Davis, Mary Jane	Davis, Ralph S, Administrator	November 22 "
52	Colteryahn, Eleanor L	Peoples Trust Co, Guardian	November 22 "
53	Potruff, H. V	Monongahela Trust Co., Administrator	November 23 "
54	Rosenberger, Michael	Rosenberger, Magdalena M, Administratrix	November 24 "
55	Gray, Margaret	Gray, Wm. H, Administrator	November 24 "
56	Wolfe, Ada Swindell	Wolfe, W. W, Administrator	November 24 "
57	Dell, Wm	Dell, Regina, Administratrix	November 24 "
58	Brenneke, Joseph	Wolf, M. F, Executor	November 26 "
59	Warnock, Mary	Warnock, Richard, Administrator	November 26 "
60	McCall, Michael	McCall, Margaret, Executrix	November 26 "
61	Dickson, Annie E	Stoner, Frank R, Administrator	November 26 "
62	Callery, John D., Wm., Charles, Marcella and Francis A	Callery, Wm. V, Guardian	November 26 "
63	McCutcheon, Luella	McCutcheon, R. A, Administrator	November 27 "
64	Martin, Joseph	Crawford, Ira B, Executor	November 27 "
65	Grguras, Joseph	Grguras, Administrator	November 27 "
66	Shields, Catherine	Shields, Catherine et al, Executors	November 27 "
67	Beresford, Henry	Fines, Wm. H, Executor	November 27 "
68	Beggs, Catherine	Beggs, Alex. W, Administrator	November 27 "
69	Doerfler, Joseph	Doerfler, Cornelius, Administrator	November 27 "
70	Rothmeier, Carl	Rothmeier, John, Administrator	November 27 "
71	Glenn, Marietta B	Kidney, Elmer L. Administrator	November 28 "
72	Rippey, Mary J	Rippey, Wm. et al, Executors	November 28 "
73	MacDougall, John L	MacDougall, Catherine Administratrix	November 28 "
74	Burke, Rachel A	Kaylor, Raymond J et al, Executors	November 30 "
75	Wirth, George	Wirth, Carolina, Executrix	November 30 "
76	Cummins, John F	Lapsley, John A et al, Administrators	November 30 "
77	Leonard, Michael H	Watterson, A. V. D, Trustee	November 30 "
78	Kiefel, Theresa	Griffith, James A, Executor	December 1 "
79	McNamara, John	Birmingham, L. Z, Administrator	December 1 "
80	Miller, Jacob P	Miller, John C, Administrator	December 1 "

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Pittsburgh Legal Journal.

ESTABLISHED 1853

CONTAINING THE DECISIONS *of the* COURTS *of* ALLEGHENY COUNTY *and* ADJOINING COUNTIE *and* THOSE *of the* UNITED STATES COURTS FOR THE WESTERN DISTRICT *of* PENNSYLVANIA

N. S. VOL. XXXVII.—No. 23. DECEMBER 19, 1906. O. S. VOL. LIV.

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EDITED BY
THOMAS EWING,
EDWARD B. VAILL,
ALLEGHENY COUNTY BAR.

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lien on the entire estate. Therefore it was the duty of Herman C. Haslage as between him and Mrs. Haslage, the plaintiff, to pay the mortgage and preserve her estate free from the obligation of the same. This being the situation, when Mrs. Haslage paid the mortgage she was entitled to subrogation, to all the remedies possessed by the mortgagee. But it is argued by counsel for the defendant that the payment by her to the sheriff satisfied the mortgage, and that the mortgage is now satisfied, and that if she desired subrogation or an assignment of the mortgage she should have demanded it before the payment; but this is not justified by the authorities. She could not demand an assignment of the mortgage until she had paid it. She could not make a good tender to the mortgagee if accompanied by a condition that the mortgage be assigned: *Forest Oil Company's Appeal*, 118 Pa. 138; *Insurance Company* v. *Fidelity Company*, 123 Pa. 523. She having paid the mortgage, and as between her and the defendant, Herman C. Haslage, the primary duty resting upon him to pay the mortgage and preserve her estate she is entitled to the possession of all securities which the mortgagee may have. "Where two persons are equally liable to the creditor, if as between themselves, there is a superior obligation resting on one to pay the debt, the other, after paying it, may use the creditor's security to obtain reimbursement. The doctrine of subrogation does not depend on privity unless confined to cases of strict suretyship. It is a mode which equity adopts to compel the ultimate discharge of the debt by him who, in good conscience, ought to pay it, and to relieve him whom none but the creditor could ask to pay:" *Bender* v. *George*, 92 Pa. 39. *McCormick's Adm'r* v. *Irwin*, 35 Pa. 111.

First. The plaintiff is entitled to subrogation and an assignment of the mortgage executed by herself and Herman C. Haslage to Charles L. Goehring and now for use of the defendant, Louise M. Rieger.

Second. The release of the property of Herman C. Haslage from the lien of the said mortgage was a fraud on the plaintiff's right and is void, and the release of said mortgage should be stricken from the record.

Let a decree be drawn in conformity with the above findings.

For plaintiff, *W. A. Way.*

For defendants, *Langfitt & McIntosh.*

(Common Pleas No. 3, Allegheny Co.)

FINK v. DUNCAN et al.

Mortgage—Purchase of part of mortgaged premises—Merger.

Where the holder of a mortgage purchases part of the mortgaged premises the mortgage is not merged, but the mortgagee is entitled to hold the mortgage to protect his interests.

No. 800 February Term, 1906. Equity.

Opinion by EVANS, J. Filed October 6, 1906.

FINDINGS OF FACT.

1. Ella R. Doherty, one of the defendants above named, on and prior to the 12th day of May, 1902, was the owner of twenty-two lots in the plan laid out by Michael A. Bright in the borough of Oakmont, Allegheny county, Pennsylvania, and on that date executed a mortgage to Joseph Vogel, Jr., as security for the payment of $4,000, which mortgage was assigned by Joseph Vogel, Jr., on the 16th day of May, 1902, to the German Savings and Deposit Bank of Pittsburgh, and by the said bank assigned to Benjamin F. Duncan on the 10th day of April, 1905.

2. On the 19th of May, 1904, the said Ella R. Doherty, with her husband, George S. Doherty, granted and conveyed to Titus K. Hauer twelve of the twenty-two lots above mentioned, which conveyance was made subject "however to a mortgage of $4,000 held by Joseph Vogel, Jr." On the 18th of August, 1904, the said defendants, Ella R. Doherty and George S. Doherty, executed a mortgage to the plaintiff, John Fink, on six of the ten lots, the title to which remained in Ella R. Doherty after the aforesaid conveyance to Titus K. Hauer; said mortgage was given to secure payment of $4,000. On the 6th day of April, 1905, Titus K. Hauer conveyed the twelve lots conveyed to him as aforesaid by Ella R. and George S. Doherty to Benjamin F. Duncan, one of the defendants, subject to

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the mortgage to Joseph Vogel, Jr. On the 10th day of April, 1905, Benjamin F. Duncan released from the lien of the mortgage given to Joseph Vogel, Jr., the twelve lots conveyed to him by Titus K. Hauer, and at No. 533 June Term, 1905, in the Court of Common Pleas No. 1 of this county, commenced proceedings to foreclose the mortgage given by Ella R. and George S. Doherty to Joseph Vogel, Jr., which was assigned to Duncan on April 10, 1905.

CONCLUSIONS OF LAW.

The plaintiff asks that the defendant Duncan be required to enter satisfaction of the Vogel mortgage, and that the release of the twelve lots be stricken off. He has his complete remedy at law. He may tender to the holder of that mortgage the amount of it and demand an assignment of it, and that is his only remedy. The purchase of the mortgage and taking assignment of the same did not necessarily work a merger of the mortgage with the fee in the twelve lots held by Duncan when he took the assignment of the mortgage. If he had owned all the property covered by the mortgage and there had been no intervening liens, then the law would presume a merger; or in other words, if there was no reason why the mortgage should be kept alive to protect any interest of the assignee and the owner of the fee, then the title of the mortgage and the title to the fee coming into the same person would result in a merger. But that is not the case here. The mortgage covers nearly twice as much property as the assignee of the mortgage owns. He then certainly has an interest for keeping it alive.

Let the plaintiff's bill be dismissed at plaintiff's costs.

For plaintiff, *R. M. Barnes.*

For defendants, *Carpenter & Chalfant.*

Court of Common Pleas No. 2,

ALLEGHENY COUNTY.

In re APPLICATION FOR CHARTER FOR THE CELTIC CLUB OF PITTSBURGH.

Charter—Application—Temporary character of members—Sale of liquors.

An application for a charter showing an extremely temporary character of membership and an ambiguous certificate regarding the sale of liquors will be refused.

No. 404 April Term, 1906.

Opinion by SHAFER, J. Filed June 6, 1906.

The certificate of organization which we are asked to approve in this case shows the purpose of the proposed corporation to be the maintenance of a club for social enjoyment, particularly providing a place where its members may meet for the discussion of their business and social affairs, and also to provide reading rooms and a place to dine, and the eighth paragraph of the certificate provides that "No intoxicating liquors of any kind shall be sold by the corporation or by any member thereof on any premises owned, occupied or controlled by said corporation." The five incorporators testified before the commissioner, and from their testimony it appears that one of them is a retired fireman, another is the proprietor of a poolroom, a third is business agent for the Lathers' union and the other two are workmen. They each testify in identical words that it is not the intention of the club to engage in the sale of intoxicating liquors or to permit any member thereof to engage in the sale of the same upon any premises owned or controlled by the club, but if any liquors are sold by the club the members drinking the same shall pay for the same. The only qualification for membership is that the member shall be a male adult above the age of 21 years.

Considering all the circumstances and the somewhat casuistical distinction made between selling liquors and paying for them, and the extremely temporary character of the membership, which would probably be the result of the qualifications of members provided, we are unable to certify that the proposed corporation would not be injurious to the community, and the application is therefore refused.

For petitioners, *Thos. J. Tierney.*

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REGISTER'S NOTICE—*Continued.*

AUDIT NOTICE.

All parties interested are hereby notified that an audit list will be made up of all the foregoing accounts (except Guardians') which shall show balances for distribution, and of all accounts to which exceptions shall be filed, and that said audit list will be taken up on MONDAY, January 21, 1907, and continued thereafter each day (Saturday and Sunday excepted) until the whole list shall have been disposed of.

ROBERT E. STONE,
Register and Ex-Officio Clerk of Orphans' Court.

Pittsburgh, December 7, 1906.

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REGISTER'S NOTICE—*Continued.*

No.	Estates of	Accountants	Filed.
81	Edwards, Wm. B.	Edwards, Hannah, Administratrix	December 3
82	Jones, Edward	McAllister, H. J, Anministrator	December 3
83	O'Brien, M. Everett	Duquesne Trust Co., Administrator	December 4
84	Manning, Mary	Manning, John J, Administrator	December 4
85	Kitchen, Margaret	Witherspoon, J. W et al, Executors	December 4
86	Beggs, Jennie R	Witherspoon, Dr J. W, Executor	December 4
87	Riemenschneider, Wm. C.	Lepper, George H, Administrator	December 4
88	Schohn, Andrew	Reese, L. B D, Executor	December 4
89	Simcsick, Jan.	Klein, Zidor, Administrator	December 4
90	Wirth, Philomena	Kuehner, Mary, Administratrix	December 4
91	Smith, Thomas	Lynch, John W, Administrator	December 4
92	Melhorn, Evalyn F.	Guarantee Title & Trust Co., Guardian	December 4
93	Spohn, Jacob	Spohn, Adam, Executor	December 4
94	Hofer, John H.	Hageman, Mary R, Executrix	December 5
95	Carey, Wm. J.	Sankey, Maggie H, Administratrix	December 5
96	Alexander, Ellen D	Larkin, Rebecca J, Administratrix	December 5
97	Crabbe, Victor Lee	Crabbe, Susie P, Executrix	December 5
98	Rueckert, Florence Edith	Rueckert, John, Guardian	December 5
99	Killen, Sarah E.	Hanna, John W, Administrator	December 6
100	Killen, Sarah E.	Hanna, John W, Administrator	December 6
101	Brown, Joseph C.	Brown, Anna B, Administratrix	December 6
102	Kleinschmidt, Michael	Kleinschmidt, George, Executor	December 6
103	Graff, Frank	Diehl, Henry J. P, Administrator	December 6
104	Curry, David H.	Hillman, Anna S. C, Administratrix	December 6
105	Fitzgibbon, Michael	Hargrave, Margaret F, Administratrix	December 6
106	Welsh, Margaret	Welsh, Michael, Administrator	December 6
107	Clarke, Mary A.	Thompson, Geo. W, Administrator	December 6
108	Conrad, Constantine	Stoelzel, Carl F, Executor	December 6
109	Francis, Isaac H.	Hamilton, W. Harry, Administrator	December 6
110	Strain, Charles	Hayes, Dennis, Administrator	December 6
111	Lindow, John.	Lindow, August, Executor	December 7
112	Parry, Thomas L.	Monongahela Trust Co, Administrator	December 7
113	McCabe, James H.	McCabe, W. Reed, et al, Executors	December 7
114	Le Fevre, Isaac S.	Citizens Deposit & Trust Co., Executor	December 7
115	Riemenschneider, Kate A.	Mercantile Trust Co, Administrator	December 7
116	Wilbert, Caroline	Johnston, Catherine, Administratrix	December 7
117	Sterrett, James P.	Sterrett, Jas R, Administrator	December 7
118	Wilson, William.	Wilson, Nelson C et al, Executors	December 7
119	Hamilton, Letitia C	Fidelity Title & Trust Co., Administrator	December 7
120	Fleming, Kate Kohen	Fidelity Title & Trust Co., Administrator	December 7
121	Miller, Margaret or Margaretha	Fidelity Title & Trust Co., Administrator	December 7
122	Kubler, Louis	Fidelity Title & Trust Co., Administrator	December 7
123	Stevenson, Mrs. L. D.	Fidelity Title & Trust Co., Administrator	December 7
124	Henry, James F	Fidelity Title & Trust Co., Administrator	December 7
125	Jenkins, Thos. M	Fidelity Title & Trust Co., Executor	December 7
126	Moran, Mary	Fidelity Title & Trust Co., Trustee	December 7
127	Moran, Agnes E.	Fidelity Title & Trust Co., Guardian.	December 7
128	Moran, Mary	Fidelity Title & Trust Co., Guardian	December 7
129	Moran, Frank J	Fidelity Title & Trust Co., Guardian	December 7
130	Moran, Jennie	Fidelity Title & Trust Co., Guardian	December 7
131	Moran, Thomas F.	Fidelity Title & Trust Co., Guardian	December 7
132	Ittell, Matilda	Fidelity Title & Trust Co., Guardian	December 7
133	Foerteh, Edward S	Fidelity Title & Trust Co., Guardian	December 7
134	Shuker, Rose E	Fidelity Title & Trust Co., Guardian	December 7
135	Pitcairn, Arthur E	Fidelity Title & Trust Co., Guardian	December 7
136	Sellers, George O.	Fidelity Title & Trust Co., Guardian	December 7
137	Phillips, Chester A	Phillips Bayard, Executor	December 7
138	Printy, Wm	Ferrara, Agnes M et al, Executors	December 7
139	Mason Charlotte M.	Safe Deposit & Trust Co., Administrator	December 7
140	Cook, Hilda	Safe Deposit & Trust Co, Administrator	December 7
141	Linsenmayer, Amy	Safe Deposit & Trust Co., Guardian	December 7
142	Burnett, Robert W	Safe Deposit & Trust Co., Guardian	December 7
143	Kohl, Ellen A	Safe Deposit & Trust Co. Guardian.	December 7
144	Duff, Clara L	Safe Deposit & Trust Co., Guardian	December 7
145	Hugo, Hilda	Safe Deposit & Trust Co., Guardian	December 7
146	Mc ormick, Nancy S	Fife, S. J. S et al, Executors	December 7
147	Lord, Allene	Equitable Trust Co, Administrator	December 7
148	West, Edward	West, Joseph A, Administrator	December 7
149	Robson, Rachael	McLean, C. B, Guardian	December 7
150	Brown, Isaac, Jr.	McClure, S. R, Administrator	December 7
151	Buchanan, John	Colonial Trust Co, Guardian	December 7
152	Haidi, Matile P	Colonial Trust Co., Guardian	December 7
153	Kelner, John E.	Kirsch, Chas. Wm, Administrator	December 7
154	Lockau, Otto	Lockau, Mathilde, Executrix	December 7
155	Armstrong, Henrietta	Thompson, Jane R. Administratrix	December 7
156	Benson, John W	Fidelity Title & Trust Co., Executor	December 7
157	Mullen, Mary	McAlinney, J. J, Administrator	December 7
158	Thoma, Margaretha	Meyer, Henry, Executor	December 7
159	Schenley, Mary E.	Carnegie, Andrew, et al, Trustees	November 23
160	Lyon, Anna H., Reed, Martha McD. et al	Jennings, W. K, Trustee	November 28
161	McKnight, Harman Denny	McKnight, Henry et al, Trustees	December 4
162	McKnight, Woodroff	McKnight, Henry et al, Trustees	December 4
163	Newhurst, James B	Fidelity Title & Trust Co., Trustee	December 7
164	Lazear, Christine L.	Fidelity Title & Trust Co., Trustee	December 7
165	Sloan, Margaret C.	Safe Deposit & Trust Co., Trustee	December 7
166	Holmes, Barbara A	Safe Deposit & Trust Co., Trustee	December 7
167	Hogg, Julia K.	Safe Deposit & Trust Co., Trustee	December 7
168	Lewis, Martha	Page, Benjamin, Administrator	December 7
169	Lewis, Charles W	Best, Robert M, Administrator	December 7
170	Ireland, Lewis N, Jr.	South Side Trust Co., Guardian	December 7
171	Strickler, Emma C.	Reese, L. B. D. et al, Trustees	December 7

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(Common Pleas No. 2, Allegheny Co.)

WOODS v. McINTIRE.

Assumpsit—Affidavit of defense—Sufficiency of.

A statement on a written contract brought by an agent of an insurance company against his sub-agent which sets forth that plaintiff furnish the defendant from time to time with a statement of the balance due to or from defendant which the defendant should examine and at once notify plaintiff of any objections thereto and upon his failure so to do it was to be taken as correct an affidavit of defense is insufficient which sets up a contemporaneous parol agreement that advances made defendant under the contract were to be treated as salary but fails to allege that the contract was modified as to the effect of the statement sent defendant and not immediately objected to.

No. 1142 April Term, 1906. Sur rule for judgment for want of sufficient affidavit of defense.

Opinion by SHAFER J. Filed May 19, 1906.

The action is upon an account stated and from the affidavits of claim and defense it appears that the plaintiff is a general agent for a life insurance company, that the defendant was a sub-agent under him under a written contract dated November 27, 1905, a copy of which is annexed to the affidavit of claim. A part of this contract is that the plaintiff shall furnish from time to time to the defendant a written statement of the balance due to or from the defendant, and that the defendant should then immediately examine the same, and at once notify the plaintiff in writing of any objections he had to the statement; and it is expressly provided that the defendant admits the statements rendered him to be correct unless he immediately notifies plaintiff of his objections. It is admitted that on January 31, 1906, a statement was rendered to the defendant by the plaintiff showing advances to him and interest thereon and showing a balance due to the plaintiff of $315.88 on that day. The affidavit of defense sets up a contemporaneous parol agreement by which it is alleged the written agreement above mentioned was modified and that the advances made to the defendant of $35 a week were to be considered salary, and not to be repaid whether earned as commissions or not. We cannot see how this can affect the account stated made long afterwards under the terms of the contract, it not being alleged that the contract was modified as to the effect of a statement sent to the defendant and not immediately objected to.

The rule for judgment is therefore made absolute.

For plaintiff, *C. A. Woods.*

For defendant, *Castle & Jarvis.*

Court of Common Pleas,

DAUPHIN COUNTY.

Commonwealth, ex rel. McNamara et al., v. Kinnsey et al., School Directors of the School District of Williamstown Borough.

School law—Reading the Bibel—Discretion of school board—Power of court—Mandamus.

A petition was presented to the court asking for a writ of alternative mandamus to compel the school board of Williamstown borough to permit scholars to attend the schools on the day, or at the time of the day, when the Bible is not read. Held, That that was a matter relating to the management and discipline of the schools which is committed by law to the judgment of the school board, and which the court has no power to control.

The proper function of the writ of mandamus is merely to set in motion; to compel the exercise of official discretion or judgment, but never to control the exercise of that discretion or judgment.

No. 647 September Term, 1906. Petition for mandamus.

Opinion by KUNKEL, J. Filed September 15, 1906.

We must refuse to award an alternative writ of mandamus, or, which is in effect the same thing, to grant a rule to show cause why a mandamus should be awarded, as prayed for in this petition. Without adverting to the absence of anything in the petition showing the beneficial interest of the petitioners in the action sought to be enforced, and of an averment that they are without other adequate and specific remedy at law, essentials required to be set forth in the petition by section 2 of the act of June

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8, 1892, P. L. 345, it is sufficient to say that, in our opinion, a case for mandamus is not presented. By the prayer of the petitioners we are asked to award a writ, commending the school board of the school district of the borough of Williamstown to "permit the children of said school district who are of the proper age, character and condition, to attend the said public school any school day, or part of school day, they may present themselves for that purpose when the Bible is read." It appears the Holy Bible is read in school by direction of the school board, and that some of the scholars have refused to be present during that part of the school exercises. This proceeding is, therefore, brought to compel the school board to permit such scholars to attend the schools on the day, or at the time of the day, when the Bibel is not read. It is manifest this is a matter relating to the management and discipline of the schools which is committed by law to the judgment of the school board, and which we have no power to control. It is a fundamental rule underlying the entire jurisdiction by mandamus and especially applicable in determining the limits to the exercise of the jurisdiction over public officers that "in all matters requiring the exercise of official judgment, or resting in the sound discretion of the person to whom a duty is confided by law, mandamus will not lie, either to control the exercise of that discretion, or to determine upon the decision which shall be finally given:" High's Extra. Leg. Rem. § 42. "The writ will issue to compel the exercise of official discretion or judgment, but the mandate will contain no direction as to the manner in which the duty shall be performed. The proper function of the writ is merely to set in motion. It will, therefore, in a proper case, be allowed to command action, but never to control discretion:" Eng. & Am. Ency. of Law, Vol. 14, page 98.

There is no complaint here that the school board has not prescribed the time for the attendance of the scholars on the schools, but the object of the proceeding is to have the court compel the school board to permit some scholars to attend at a different time from that prescribed. This we have no power to do. If the reading of the Bible in the schools is unlawful, it may be enjoined; if it be lawful and a proper exercise of the discretion vested in the school board in the conduct of the schools, the petitioners have no ground of complaint. But that question is not necessarily involved here and we do not pass upon it.

The prayer of the petitioners is, therefore, overruled.

For petition, *A. F. Thompson.*

From Paul A. Kunkel, Esq., Harrisburg, Pa.

Finding Long Hidden Property.

The question of the rights of a person who finds property which once hidden, and has remained concealed so long that the original owner is unknown and doubtless dead, and all trace or memory of the place of hiding has passed into oblivion, is somewhat novel. There are few cases in which such a question has been considered, though they are many with respect to the rights of one who finds property that had been merely lost. Obviously property that has been hidden remains the property of the original owner so long, at least, as the owner, or any person claiming under him, retains, knowledge of the hiding place. Beyond doubt, also, the original or his successor in title, is entitled to the property when found, even if he had entirely forgotten where the property was, if the identify of such owner can be ascertained by the finder. But when the owner is dead, his identity utterly lost, and no one can be discovered who has any claim through him to the property, is it to be regarded, when found, as if it were lost property?

A case of exceptional interest on this question was recently decided by the Supreme Court of Oregon in Ferguson v. Ray, 44 Or. 557, 1 L. R. A. (N. S.) 477, 102 Am. St. Rep. 648, 77 Pac. 600. In that case gold-bearing quartz was found where it had been buried in some kind of a bag near a tree on which marks had been made, for the purpose no doubt, of relocating the hiding place. The quartz had been hidden so long that the bag had almost entirely rotted away, and it was impossible, from any facts existing, to determine anything whatever with respect to the identity of the owner of the property.

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Estate of VINCENZO PASCUZZI, Deceased.

IN THE ORPHANS' COURT
OF ALLEGHENY COUNTY.

No. — December Term, 1906.

Notice is hereby given that the minor children's appraisement in the above estate was filed and approved *nisi* by the Court on December 8, 1906, and that said approval will become absolute in one month, unless exceptions are filed thereto in the meantime.

FIDELITY TITLE & TRUST COMPANY,
23-2 Guardian.

S. M. MEALS, 416 Grant Street.

Estate of ISAAC BROWN, Jr., Deceased.

IN THE ORPHANS' COURT
OF ALLEGHENY COUNTY.

No. 191 March Term, 1906.

Notice is hereby given that the widow's appraisement in the above estate was filed and approved *nisi* by the Court on March 5, 1906, and that said approval will become absolute in one month, unless exceptions are filed thereto in the meantime.

LELIA B. BROWN,
23-2 Widow.

CHAS. W. DAHLINGER, 518 Fourth Avenue.

IN THE COURT OF COMMON PLEAS No. 2,
OF ALLEGHENY COUNTY, PENN'A.

No. 206 April Term, 1905.

Commonwealth ex rel. vs. William C. Staving.

Notice is hereby given that the first and final account of T. C. Allison, Committee in lunacy of said William C. Staving, now deceased, has been filed at above number and term, and that the same will be allowed by the said court on Saturday, January 12, 1907, at 9:30 o'clock a. m., unless cause be shown to the contrary.

CHARLES W. DAHLINGER,
23-3 Attorney for Committee.

MARCUS W. STONER Bakewell Law Building.

STATE OF PENNSYLVANIA,
COUNTY OF ALLEGHENY, SS.

In the Court of Common Pleas No. 1.
No. 389 March Term, 1905.

In re Estate of THOMAS GAMBLE, Deceased.

To all persons interested:—Notice is hereby given that the undersigned, Marcus W. Stoner and John R. Wheeler, trustees in re estate of Thomas Gamble, deceased, filed their account in said court at the number and term aforesaid on December 18, 1906, and that the same will be allowed and confirmed nisi on Saturday, the 12th day of January, 1907, at 9:30 o'clock a. m., to become absolute in ten days thereafter unless exceptions be filed thereto in the meantime.

MARCUS W. STONER,
JOHN R. WHEELER,
23-3 Accountants.

KENNEDY & McVICAR, 919 Frick Building.

IN THE COURT OF COMMON PLEAS No. 2,
OF ALLEGHENY COUNTY, PENNA.

No. 99 July Term, 1906.

M. J. Agan vs. Pittsburg Organ & Piano Company.

Notice is hereby given that the undersigned has been appointed Auditor to make distribution of the fund in the hands of the Guarantee Title & Trust Company, Receiver of the Pittsburg Organ & Piano Company, as shown by its account, and that a meeting will be held at the office of the Auditor, No. 919 Frick Building, Pittsburg, Pa., on Monday, December 31, 1906, at 2 o'clock p. m., for the purpose of said appointment, at which time and place all persons interested are requested to be present.

EDWARD J. I. GANNON,
Auditor.
21-3 Pittsburg, Pa.

LEGAL ADVERTISEMENTS.

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Estate of IRA N. FIX, Deceased.

IN THE ORPHANS' COURT
OF ALLEGHENY COUNTY, PA.

No. — December Term, 1906.

Notice is hereby given that the widow's appraisement in the above estate was filed and approved *nisi* by the Court on December 11, 1906, and that said approval will become absolute in one month, unless exceptions are filed thereto in the meantime.

CLARA C. FIX,
22-2 Widow.

DANIEL HARRISON, 424 Fifth Avenue.

Estate of SAMUEL GOLDEN, formerly SAMUEL H. GOLDING, Deceased.

IN THE ORPHANS' COURT
OF ALLEGHENY COUNTY, PA.

No. — December Term, 1906.

Notice is hereby given that the widows' appraisement in the above estate was filed and approved *nisi* by the Court on December 4, 1906, and that said approval will become absolute in one month, unless exceptions are filed thereto in the meantime.

EMMA GOLDEN,
22-2 Widow.

R. E. IRONS, 411 Grant Street.

Estate of MILO IRONS, Deceased.

IN THE ORPHANS' COURT
OF ALLEGHENY COUNTY.

No. 120 December Term, 1906.

Notice is hereby given that the widow's appraisement in the above estate was filed and approved *nisi* by the Court on December 6, 1906, and that said approval will become absolute in one month unless exceptions are filed thereto in the meantime.

ELIZA IRONS,
22-2 Widow.

IN THE COURT OF COMMON PLEAS No. 1,
OF ALLEGHENY COUNTY, PENNA.

No. 656 June Term, 1906.

Barnetta Bly vs. Lawrence Bly.

To Lawrence Bly, respondent.

You are hereby notified that above case will be called for trial at the Allegheny County Court House, Pittsburgh, Pa., on Monday, January 14, 1907, at 10 o'clock a. m., or as soon thereafter as the Court can hear the same; when and where you may attend if you see proper.

M. H. STEVENSON,
22-3 Attorney for Libellant.

MARRON & McGIRR, 522 Frick Building.

IN THE COURT OF COMMON PLEAS No. 1,
OF ALLEGHENY COUNTY, PA.

No. 125 December Term, 1906.

Hugo Sidenberg and Morris J. Rich, partners, as Sidenberg & Rich, vs. J. A. Perley, surviving partner of the firm composed of J. A. Perley and M. B. Perley, trading as Perley & Brother.

Notice is hereby given that the first and final account of Charles H. Friend, Receiver of the defendant above named, has been filed in the Court of Common Pleas No. 1 of Allegheny County, Pennsylvania, at the above number and term, and said account will be allowed by the Court on Saturday, December 29, 1906, unless cause be shown to the contrary.

MARRON & McGIRR,
22-3 Attorneys for Receiver.

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The court held, nevertheless, that the property could not be regarded as lost property which would belong to the person who found it, but must be regarded as a part of the soil, belonging to the owner of the real estate. Additional interest attaches to the case because of its remarkably close similarity to the earlier case of Danielson v. Roberts 44 Or. 108, 65 L. R. A. 536, 102 Am. St. Rep. 627, 74 Pac. 913, in which the court reached exactly the opposite conclusion. In the earlier case the property consisted of $7,000 of gold coin inclosed in sacks within a half-gallon tin can, and was found buried under several inches of dirt and a mass of debris in an old henhouse. In each case the property was buried in the ground and was dug up by the finder. In each instance it was impossible to determine the identity of the original owner. But in the Danielson Case the court held that the property belonged to the finder, and in the Ferguson Case it held that the property belonged to the owner of the land, and not to the finder. In the Danielson Case the court expressly said that "the reason of the rule giving the finder of lost property the right to retain it against all persons except the true owner applies with equal force and reason to money found hidden or secreted in the earth as to property found on the surface." But in the later Ferguson Case the court adopts the opposite conclusion, and holds that, because the property was originally hidden by the owner it was not lost, and the rule respecting the finding of lost property does not apply to it. While the court, in the Ferguson Case, cites its decision in the earlier Danielson Case, it does not call attention to the striking difference in the decisions, but cites the former case as if it were a precedent for the latter.

A recent decision of the appellate division of the New York Supreme Court, in Burdick v. Chessbrough, 94 App. Div. 532, 88 N. Y. Supp. 13, agrees with the latest decision of the Oregon court. That was a case of valuable earthenware discovered and dug up out of the soil of a farm where it had long been buried, with nothing to show who was the original owner. The suit was brought by executors of the owner of the farm against the person who had taken the property out of the soil. The court held that the action could not lie, because, as executors, the plaintiffs had no title, and though as individuals they had an interest, they were merely tenants in common with others who were not joined. But the court laid down the law on the subject to the effect that, "if personal property is deposited beneath the surface of the soil, and so left until the place where it is so deposited is forgotten, and the owner thereof, if living, or his personal representatives if he is dead, cannot be found, such personal property, so in the possession of the owner of the soil, becomes as a part of the soil the property of the owner of the real property; . . . when it is discovered and removed from the soil as against everyone but the owner, it becomes the personal property of the owners of such real property, and not the property of the finder thereof."

A case of the digging of property out of the soil where it had long been embedded, though it did not involve any element of an original hiding or concealment of the property, but a probable abandonment of it, was decided in Elwes v. Brigg Gas Co. L. R. 33 Ch. Dix. 562, 55 L. J. Ch. N. S. 734. This was the case of a boat which had been buried for two thousand years probably, and had been presumably abandoned or left derelict by its original owners on what is now a river bank. By natural processes during the centuries, such as sinking into the ooze, and the deposit of aliuvial soil, it had become buried in the earth until it was excavated by a gas company which was in possession of the premises under a ninety-nine-year lease. But the court held that it was the property of the lessor, even though the existence of the boat was unknown when the lease was made.

The finder of an aerolite, who claimed title to it as against the owner of the soil into which it had embedded itself as it fell from the sky, was denied the right to it in Goddard v. Winchell, 86 Iowa, 71, 17 L. R. A. 788, 41 Am. St. Rep. 481, 52 N. W. 1124. This case of course is similar to those of hidden property above mentioned, only in the fact that the property was found embedded in the earth. The numerous cases as to the rights of the finder of lost property

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have nearly all of them related to property that was found on or above the surface of the earth, or in the water. Whether there is, or should be, a distinction between those cases and those in which property actually lost is found embedded in the soil, may be fairly open to inquiry. It is not easy to see that such property is any the less a part of the soil if it were merely lost in the first place, than if it were originally hidden instead of lost, provided that in both cases, when found, it is actually buried in the earth. The case of the boat found in England was probably the case of an abandoment, but if, instead of that, it had been a case in which the owner had actually lost the boat, it would have been no less a part of the soil in fact, and it is not easy to see why, in the reason of the matter, it would have been any the less the property of the owner of the soil. But on the question to the rights to property found embedded in the soil which had been actually lost, there is very scant authority for making any confident statement as to what the law is. As to property originally hidden in the soil and found there, it can hardly be said that the law is fully settled, but there seems to be at least some balance of authority for the conclusion reached in the Ferguson Case.—*Case and Comment.*

Enforcement in Equity of Illegal Contract.

A striking illustration of the power of a court of equity to modify a clearly established rule is furnished by a recent decision of the Supreme Court of Washington in the case of a contract which was contrary to public policy because designed to create a monopoly. Ordinarily, by the clearest of rules, such contracts are denied enforcement by the courts, but in this Washington case, notwithstanding such an illegal feature of a contract to furnish a supply of electricity to a streetcar and electric lighting company, in the city of Seattle, the court decided that, because the public interests were involved, it would enforce the contract temporarily, and would not allow the defendant arbitrarily and without warning to cut off the supply of electricity from the streetcars and lighting systems of the city. It is therefore the somewhat strange case of a court of equity giving affirmative relief by means of an injunction, to one party to a contract which is against public policy, against the attempt of the other party to refuse performance. This, in effect, amounted to granting the specific performance of the contract for a limited time. In one way of stating the case, the court refused to follow the general doctrine which denies affirmative relief to either of the parties who are in pari delicto in an illegal contract. But in reality it is not out of harmony with the general doctrine. The refusal of the courts to enforce such contracts is based on the ground of public policy. That is, it is adopted in the interest of the public welfare. It is not all because of any consideration of interest of either of the parties to the contract. It simply leaves them where it finds them, no matter what the plight of either may be. The refusal to enforce the contract is not for the protection of the defendant, but for the protection of the public, by discountenancing such contracts. In the present case, which is that of Seattle Electric Co. v. Snoqualmie Falls Power Co. (Wash.) 1 L. R. A. (N. S.) 1032, 82 Pac. 713, the court grants an injunction which is in the nature of compelling specific performance of the contract for such time as will enable an adequate supply of electricity to be procured from other sources so as to save the public from great inconvenience. This is only a recognition of a greater public interest in such limited enforcement of the contract than there could be in refusing it. The ordinary rule of public policy gives way, in the exceptional case, to an extraordinary public interest in the other direction, so that the principle on which the court ordinarily denies affirmative relief on the contract because it would be against the public interest, operates in the present case much more strongly to require that such relief be granted. While the case is exceptional in its application of the principle, there are other cases which lend it support. In Conger v. New York, W. S. & B. R. Co., 120 N. Y. 29, 23 N. E. 983, a specific performance of the contract was denied because its performance would prejudice the public interest. And in the case of Curran v. Holyoke Water Power Co., 116 Mass. 90, it was held that, in de-

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termining the question of specific performance of a contract, the rights of third persons were to be taken into consideration. The present case, however, makes an especially clear application of the principle that the interests of the public will determine the question of affirmative relief on a contract against public policy. The court says: "It would have been greater wrong than any to which the appellants confessed, to have permitted them arbitrarily and without warning to stop from operation the streetcar and lighting systems of the city."—*Case and Comment.*

PUBLIC NUISANCE. (STREET FAIR—POWER OF CITY COUNCIL.)

GEORGIA SUPREME COURT.

In City Council of Augusta v. Reynolds, 50 Southeastern Reporter, 998, the Supreme Court of Georgia announces that a fair, occupying, for over a week, seventy or eighty feet in width and four blocks in length of an important business street in the city, and consisting of numerous tents, inclosing shows and exhibitions, in front of which are stationed men blowing horns and talking through megaphones to attract attention, together with various other stands, booths, structures, Ferris wheels, merry-go-rounds, and other devices for amusement, for the public and profit to the owners, a company of state militia, is a public nuisance of a most aggravated nature.

Some of the old English cases which held that a fair in a highway is permissible, for example, Elwood v. Bullock, 15 L. J. N. S. and King v. Smith, 4 E. S. P. 109, are referred to, and it is shown that the rule in those cases was based upon the existence of an immaterial custom in addition to which, it is to be remarked, that the old English fairs were very different enterprises from the one described. It is also held that there is nothing in an ordinary city charter which permits the city authorities to grant the use of its streets for the operation of an enterprise of the nature described.—*The Green Bag.*

VAGRANCY AS CAUSE FOR DIVORCE.—The St. Louis Court of Appeals delivers a very comforting decision in Gallemore v. Gallemore, 91 Southwestern Reporter 406. A provision of the Missouri Statutes declaring that every able bodied man who shall neglect or refuse to support his family shall be deemed a vagrant, and that when the husband shall be guilty of such conduct as to constitute him a vagrant the wife shall be entitled to a divorce, is construed, and it is held that where a physician of good habits endeavored to establish a practice, maintained an office where he waited for patients, and attended to such calls as he had, contributing his entire income from his practice to the support of his wife and himself, he was not a vagrant within the meaning of the statute, though he did not succeed in earning enough to support his wife and himself, and she was compelled to contribute to their support from her separate means.

The Supreme Court of Kansas declares in McAllister v. Fair, 84 Pacific Reporter, 112, that under a statute of Kansas, providing in clear language that a husband shall inherit from his deceased wife and making no exception to the rule, the court is not justified in reading into the statute a clause disinheriting a husband because he feloniously killed his intestate wife for the purpose of acquiring her property.

Where, four days prior to adjudication, property is purchased from a bankrupt and paid for without knowledge of its insolvency In re Davis Tailoring Co., 16 Am. B. R. 486, holds that the question as to the title of the property should be adjudicated either in replevin or some other proper form of plenary suit and a summary order requiring the vendee in possession of the purchaser to turn over the property to the trustee, will be set aside as unauthorized.

Where a bankrupt corporation sold certain chattels covered by a purchase-money mortgage, to another corporation and a new mortgage covering the same and additional property is given to the original mortgagee, it is held in Long v. Gump, 16 Am. B. R. 501, that he is entitled to enforce his lein against the proceeds of a sale of the property by the trustee in bankruptcy of the selling corporation, whether the taking of the new mortgage effected a novation of the debt secured by the first mortgage or not.

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EDWARD B. VAILL, THOMAS EWING, } EDITORS.

N. S. Vol. XXXVII. O. S. Vol. LIV. } No. 24.

PITTSBURGH, PA., DECEMBER 26, 1906.

Court of Common Pleas No. 2,

ALLEGHENY COUNTY.

HARTJE v. HARTJE.

Divorce—Evidence—Unexplained circumstances --Presumptions.

In an action for divorce where libellant alleges certain facts in the libel and offers no proof of them on the trial it will be presumed he is unable to prove them.

A husband strongly urged his wife in affectionate terms to come back and live with him and a few days later withdrew the request and brought an action for divorce. No evidence was given to show why the change of position was taken or that any new facts had been discovered. Held, that while not conclusive the facts raised a presumption which detracted from the value of libellant's testimony and went directly to the good faith of his accusations.

No. 159½ January Term, 1906. In divorce.

Opinion by FRAZER, P. J. Filed December 13, 1906.

The testimony shows that libellant and respondent were married on the 15th day of March, 1894, and lived together until the 24th day of July, 1905, when they separated, respondent, at that time and within two days after the family's return from a trip to Europe, taking their two children and going to reside at the home of her parents. Immediately after the separation libellant, through mutual friends and also by a letter to his wife, dated July 26, 1905, endeavored to effect a reconciliation. These efforts proving unsuccessful, libellant again wrote his wife on August 5, 1905, withdrawing his previous request for a settlement of their differences. This latter letter was followed by these proceedings, in which respondent was charged with having committed adultery with Thomas Madine, a coachman who was in the employ of libellant from April 6, 1904, until June 5, 1905, and "divers other persons." Subsequent to filing this libel and in response to rules for bills of particulars, libellant alleged acts of adultery on the part of respondent with Clifford Hooe, a colored man, who was also employed by libellant as a coachman from April to about July 1, 1905, and with a man whose name was not given, whom respondent was charged with meeting at a prominent hotel in this city. Respondent was also charged with visiting and meeting men at an assignation house in Watson street.

At the trial no evidence was offered in support of any of the charges except that of adultery with Madine. The failure to even attempt to sustain those charges may and should be treated as an admission of libellant's inability to prove them. We therefore have before us for determination the single allegation of criminal intimacy with Thomas Madine. In support of that allegation witnesses were called by libellant who testified to occurrences which they said took place between Madine and respondent in the Hartje home, and in addition to that testimony twenty-six letters of a highly incriminating nature were offered in evidence, which libellant claimed were written by respondent to Madine.

The burden of proof was on libellant to show respondent's guilt by the weight of the testimony. He must prove the offense charged against his wife, either by affirmative testimony or by "circumstances that would lead the guarded discretion of a reasonable and just man to the conclusion of guilt." Has he sustained the burden? The witnesses called to prove the occurrences which are said to have taken place at the home of the parties were, with one exception, servant girls who had lived in the family. Of these witnesses, Katie Schempel was employed as a cook for about seven weeks, beginning in February, 1905, and Fannie Jackolitch, also a cook, was there for three months in the fall of 1904, and also from April to June, 1905. The testimony of Katie Schemple, as a whole, is rather more favorable to respondent than libellant. Both girls say Madine was fre-

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quently in the upstairs part of the house, and while Fannie Jackolitch testifies to one or two incidents which were not consistent with prudent conduct on the part of respondent, those occurrences, if true, indicate no more than an impropriety. The testimony of Katie Schempel proves nothing, and that of Fannie Jackolitch is of little weight, especially in view of the fact that she admitted on cross-examination that Madine when upstairs usually played with the children and that Susie Wagner was generally on the second floor at the same time. Annie Lutz, a seamstress in the Hartjes' house at intervals during several years immediately preceding the separation, also testified that she had often seen Madine in the upstairs hall and also in the nursery and that he had slept in the spare-room on two occasions during the absence of libellant from home. She, however, also said that she "never saw respondent do anything wrong," and that she was "kind to the servants, devoted to her children and a good mother." Aside from her statement that Madine slept in the spare-room on two occasions during libellant's absence from home, which was denied by both respondent and Madine, there is nothing in her testimony to indicate more than imprudence on the part of respondent. Of the servants in the Hartje house Susie Wagner, an "upstairs girl," was the most favorable in her testimony toward libellant. Susie entered their employ September 1, 1904, and remained with them until June 1, 1905, when she accompanied the family to Europe, leaving them, however, upon their arrival in Liverpool, and going to the home of her parents in Germany, where she remained until the latter part of September when she returned to this country, arriving in New York about October 1, 1905. This witness testified to several incidents of a highly incriminating nature in which she said respondent and Madine figured. That her story is grossly exaggerated and built upon a very slight foundation, is quite apparent. She is flatly contradicted by both respondent and Madine and is not corroborated in any instance by a single witness. It seems impossible that all the happenings testified to by her should have taken place in the Hartje house and not a single one of them be witnessed by one or more of the other servants. Susie was a strongly prejudiced witness, and in giving weight to her testimony we must consider that she was brought to this country from Germany in the fall of 1905 by her brother at the request and expense of libellant; that she was met upon her arrival in New York by libellant and his attorney; that she has been under the influence of relatives of libellant since her return to a considerable extent, and that while in New York upon her return to this country she was shown statements purported to have been made by two other servants and told that "she knew the same and maybe more;" that she is not even an ordinarily bright girl, and that she also made a statement to respondent's attorney, in which she said "that she did not know anything bad about respondent." We cannot conceive that a married woman of intelligence and refinement and the mother of children would be guilty of such intimacy with a male servant as Susie testified respondent was guilty of with Madine. The improbability of her story brands it with suspicion.

The testimony of these four servant girls is relied upon to establish incidents happening in the Hartje home, which libellant claims indirectly proves criminal conduct upon the part of respondent. Both respondent and Madine denied all improper conduct charged against them, and called other servants who were employed in the family from time to time during the years 1904 and 1905, who testified that respondent's conduct was proper at all times and that they had seen no wrongdoing upon her part or undue intimacy with Madine. It was admitted by respondent that Madine was frequently in the front part of the house and also upstairs. It was, however, denied that he was there at any time for an improper purpose. The weight of the testimony is that he was employed to assist in certain housework, beating rugs, moving furniture and cleaning porches, as well as driving the horses. Among other things, it was his duty to drive the little daughter of libellant and respondent to the kindergarten she attended, and it is uncontradicted that he usually carried the little girl from the

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nursery to the carriage in the morning and back to the nursery from the carriage upon bringing her home; and it is also uncontradicted that Madine often at libellant's request spent the evenings with the children in the nursery while libellant and his wife were out driving. These duties satisfactorily explain Madine's being so frequently on the second floor. Giving the testimony offered to prove the incriminatory house incidents the fullest credit it is in our opinion entitled to receive, we are clearly of the opinion that it does not establish either directly or by inference a criminal intimacy between respondent and Madine.

Respondent's visits to the stable are relied upon to assist in sustaining the libel. The testimony shows that respondent has a fondness for fine horses and took great pride in their horses and carriages. That she visited the stable quite frequently is admitted. Her visits there, however, were not so common and made under such circumstances as to justify even an inference of criminal intimacy with the coachman, and were it not for the testimony of a sister of libellant, who says that upon going to the Hartje stable one morning she saw respondent and Madine coming from an alcove, I should not deem it necessary to even refer to that branch of the case. The witness said respondent was embarrassed, and that she, the witness, felt very much as though she had intruded. Respondent denied receiving a call from the witness under the circumstances detailed by her. Assuming, however, that witness called at the Hartje house and found respondent at the stable, the occurrence, it seems to me, was not at the time looked upon by her in an unfavorable or suspicious light. She said nothing to either her sister-in-law or libellant about the incident and continued upon friendly and intimate terms with respondent until respondent's separation from her husband. While it is quite probable that the witness went to the stable as she testified and found respondent and Madine both there, the circumstance indicates no more than indiscretion upon respondent's part, especially as the stable doors were open and afforded an opportunity to any person to walk in without notice or warning. While respondent visited the stable perhaps oftener than prudent women customarily do, her fondness for fine horses and carriages, in which she was encouraged by her husband, is to a certain extent an excuse for what the testimony at most shows was an indiscretion upon her part.

In addition to the testimony of incidents at the Hartje home, libellant offered in evidence to support his libel twenty-six letters which he claimed were written by his wife to Madine. These letters, if written by her, contain sufficient admissions to convict her of the improper conduct charged in the libel. To establish their genuineness, which was denied by both respondent and Madine, comparison was made with certain admitted letters and writings of respondent, which were used as standards. Among the standards first offered was a letter addressed to Susie Wagner, the servant above referred to, and marked exhibit No. 6. This letter was at first, upon a casual examination, admitted by respondent to be in her handwriting; subsequently, however, upon further examination, it was repudiated by her. In libellant's case in chief, he and two experts on handwriting testified that all the disputed letters were in the handwriting of respondent, and a third expert testified that some of them were written by her. The testimony of these witnesses was very much weakened by their testifying that exhibit No. 34, an envelope addressed to Madine, was also written by respondent; that envelope was undoubtedly addressed by a sister of respondent; the young lady so testified, and stated the circumstances under which it was addressed, and while on the witness stand at the request of counsel addressed two envelopes with the same inscription as that contained on exhibit No. 34, which to my mind clearly established the identy of her handwriting. The testimony of these witnesses and the experts who were afterwards permitted to testify in regard to exhibit No. 6, the Susie Wagner letter, was not convincing. While they selected letters and words in both the standard and disputed writings that were almost identical in form and shading they admitted that the writing in the standards was angular and irregular, while that in the disputed letters

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was round and uniform, in other words, that the penmanship of the disputed letters was better than that of the standards and more easily read. These experts also admitted a difference in the pictorial effect in the writing in the two sets of letters. On the other hand, the experts and other witnesses called by respondent to disprove the letters, almost without exception sustained their opinions with substantial reasons. These witnesses included members of respondent's family, experts of national reputation, bank officers of this city and teachers of penmanship in our city High School. Practically but three persons, libellant and two experts on handwriting, testified that the disputed letters (excepting Ex. No. 6) were written by respondent. The opinion of these experts was based upon a comparatively brief examination of the papers. Subsequently, however, these and other experts were permitted to testify upon further examination as to the genuineness of the "Susie Wagner letter," exhibit No. 6. Whether that letter is in the handwriting of respondent is very material in determining whether or not the other disputed letters were written by respondent. A number of the experts called on each side testified that the person who wrote exhibit No. 6 also wrote many of the other disputed letters. The penmanship of that letter is certainly different in several particulars from that of respondent. While the writing in exhibit No. 6 resembles that of respondent, an inspection reveals considerable difference from her admitted penmanship, both in the formation and shading of the letters and also in the pictorial effect of the writing. Instead of the angular formed letters of the standards the writing in the Susie Wagner letter is round, and instead of being written in the nervous and careless style of respondent, the letter has every appearance of deliberate preparation. The letter, in our opinion, is not in the handwriting of respondent. This conclusion is strengthened by the circumstances under which it reached Miss Wagner. Respondent says she wrote Susie but two letters, one from London and the other shortly after her return from Europe, and Susie says she received two letters from respondent while in Germany, one written in London and the other in Pittsburgh; this latter one she says she brought with her to this country, and upon her arrival in New York about October 1st gave it to libellant's brother. The disputed letter, exhibit No. 6, was not received by her until the latter part of November, and was forwarded to her by her mother from Germany about two months after her return to this country, and more than six weeks after respondent had seen and talked with her in this city. The letter, like the other disputed ones, is not dated, nor is the post-marked envelope produced with it. In addition to respondent's denial that she wrote the letters, and that of Madine that he ever received them, and the testimony of the experts, which is overwhelmingly to the effect that the disputed letters were not written by respondent, there are several circumstances which strongly confirm that conclusion. The fact that not a single one of the disputed letters bears a date, attaches suspicion to them, as does also the fact that but a single post-marked envelope accompanies them, and that one certainly not in respondent's handwriting.

With these circumstances must also be considered the manner in which libellant claims to have obtained possession of the letters. We know of no law that authorizes a litigant to commit a felony or other crime for the purpose of enabling him to secure evidence to sustain his litigation, yet, in this case, if their testimony is true, libellant's detectives entered the boarding-house of Madine for the purpose of robbing him, and actually did take from him papers that had no connection with this case whatever. While they say that, at the same time, they also secured the disputed letters from Madine's trunk, Madine says he never had them in his possession, and never saw them until they were produced in court and offered in evidence. It was argued that Madine's denial should have little weight on account of his interest in the determination of this case; it can also be said that those who contradict him in regard to the letters are self-admitted lawbreakers. We saw nothing in the manner of Madine as a witness that suggests any reason why he is not as worthy of belief as the two detectives who say they robbed him. In addition to Madine's denial, the detectives are flatly con-

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tradicted in material parts of their testimony by both the woman who kept the boarding-house and her daughter; and further, if these letters are genuine and were obtained from Madine's possession, why were they so mysteriously mailed in bundles at intervals to libellant's counsel by libellant's brother-in-law, to whom they were given by the detectives, instead of being delivered personally? This latter circumstance was not satisfactorily explained, and it alone is sufficient to stamp the letters with suspicion. On the whole, instead of libellant establishing the genuineness of the disputed letters, as the burden was on him to do, by the weight of the testimony, the preponderance of the evidence shows that these letters are not in the handwriting of respondent.

Giving the testimony offered by libellant the fullest credence it is in our opinion entitled to receive, we are clearly of the opinion it fails to sustain the libel and convict respondent of criminal intimacy with Thomas Madine. We are confirmed in this conclusion by the failure of libellant to furnish any account of what facts came to his knowledge concerning the conduct of his wife, or how he became advised of them during the interval between his two letters to her of July 26th and August 5th, above referred to.

Immediately after respondent went to the home of her parents, libellant through his brother and also through an intimate lady friend of respondent endeavored to induce her to return to him, and in addition to personal requests upon the part of these persons, libellant two days after the separation wrote his wife asking her to return to their home; the letter begins, "My dear Mary," and after reciting that his brother had informed him of respondent's absolute refusal to return home, imploringly asks her "as his wife" to come back, and closes with the words, "Lovingly yours." Certainly, when libellant wrote that letter, there was not even a suspicion in his mind of improper conduct upon the part of his wife. There being no evidence to the contrary, we must assume that up to this time libellant had not the slightest reason to suspect his wife of being criminally intimate with either Madine or any other person. Had he even suspected her of wrong-doing that letter would not have been written. Ten days later he wrote her again as follows: "Since my letter to you of July 26-95, asking you to come back, facts have come to my knowledge which give me ample reasons to recall my request for your return to me. I therefore recall the offer made in that letter;" yet in his testimony at the trial there is not a single word indicating what facts had come to his knowledge between the writing of the two letters that gave him "ample reason" to recall his request for a reconciliation. Certainly, he had not learned what Susie Wagner would testify to, as she was then in Europe. There is no evidence to show that he even knew where the other servant girls were at that time, or had any information as to what they would testify to, and he could not have known of the incriminating letters as they were not taken from Madine's trunk until about a year afterwards, according to the detectives' testimony. What knowledge had he acquired in the meantime concerning his wife's conduct? The testimony fails to show that he had obtained any information on that subject. While his failure to show what information he received during that interval is not conclusive against the truthfulness of his charges against his wife, it is, especially under the circumstances of this case, an omission that not only detracts from the value of the testimony offered to support the charges, but goes directly to the good faith of the accusation.

In view of the conclusion reached above, we deem it both unnecessary and inadvisable to discuss the affirmative testimony offered by respondent to show adulterous practices on the part of libellant, especially as that testimony will no doubt be at least partially relied upon by respondent to sustain the libel in her proceeding against her husband for a limited divorce, which is not pending.

And now, December 13, 1906, decree refused and proceedings dismissed at cost of libellant.

For libellant, *W. B. Rodgers, J. S. Ferguson* and *Ed. G. Hartje.*

For respondent, *Watson & Freeman* and *M. C. Acheson.*

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(Common Pleas No. 2, Allegheny Co.)

REED v. DIPPLE.

Judgment note—Opening of—Defenses of discharge in bankruptcy.

A judgment note will not be opened on the ground that the indebtedness was set forth in the schedule of assets of the debtor who had been discharged in bankruptcy, where it appears that the debtor failed to set forth in his schedule the full name and proper address of the cr ditor who had received no notice of the bankruptcy proceedings. It is the duty of bankrupts to set forth with sufficient accuracy the names and addresses of creditors to insure to them not ce of the proceedings.

D. S. B. No. 136 April Term, 1906. Sur rule to open judgment.

Opinion by FRAZER P. J. Filed May 23, 1906.

The judgment in this case was entered February 10, 1906, upon a judgment note for $500 dated February 17, 1904, and payable at three months after date. The facts agreed upon in writing by the parties in substance show that defendant was on the 28th of January, 1902, adjudicated a bankrupt, and in his schedule of indebtedness filed in those proceedings, "Joseph Reed, Leader Building, 5th Ave., Pittsburgh, Pa.," appears as a creditor for the sum of $550. It is also agreed that plaintiff's office address is Maeder Building, Fifth avenue, Pittsburgh, and that he had no notice whatever of the bankruptcy proceedings against defendant until subsequent to entering the judgment in this case. The sole reason relied upon to open the judgment is defendant's adjudication and subsequent discharge in bankruptcy. The note in question is in the usual form of judgment notes in use in this commonwealth, and contains among other clauses the following: "and also waive the benefit of the present and any future bankrupt law that may be passed by the United States."

Defendant's contention is that the judgment should not be opened (1) because of the waiver of the benefit of the bankrupt law therein contained, and (2) because of defendant's failure to set forth the plaintiff's full name and proper address in the schedule of debts. It seems to us defendant's neglect or oversight in not giving plaintiff's full name and proper address is a sufficient reason for not opening the judgment, especially as that neglect deprived plaintiff of receiving notice of the proceedings and thereby prevented him from presenting his claim with those of other creditors for payment, or, if he saw fit to do so, to object to defendant's discharge. In our opinion the bankrupt act requires debtors to state with sufficient exactness the names and addresses of creditors to reasonably insure to them notice of the proceedings, and if a debtor fails to do so in any case, he ought not to be released from that particular obligation. This it seems to us was the intention of the act of Congress. The other reason set up in opposition to opening the judgment need not be considered.

Under the facts agreed upon it clearly appears that plaintiff because of the negligence of defendant had neither notice nor actual knowledge of the proceedings in bankruptcy against defendant. He is therefore not bound by those proceedings.

The rule to open judgment is discharged.

For plaintiff, *Harvey A. Miller.*

For defendant, *John A. Metz.*

Court of Common Pleas,

DAUPHIN COUNTY.

McJUNKIN'S AND DIGHTS'S NOMINATION.

Election law—Right of political party to nominate by papers—Right to use its own name.

The provision in Sec. 3 of the act of 1897, prohibits a political party from using its own name when it nominates by nomination papers in a district where the party is entitled to nominate by certificate of nomination.

The Republican party in Butler county under its rules nominated McJ. and D. for members of the legislature. A certificate of nomination was duly prepared but its filing was neglected within the time. Thereupon said party nominated the same candidates by nomination papers which were duly filed. Objection was made that the Republican party had no right to use the name Republican in said papers for the reason that certificates of nomination have been filed by the Re-

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publican party for other offices, elsewhere and throughout the State. Objection sustained, but leave given to amend.

No. 115 January Term, 1907.

Opinion by CAPP, J, Filed October 16, 1906.

The Republican party in Butler county under its rules nominated Ira McJunkin and J. M. Dight as its candidates for the office of the general assembly from said county.

A certificate of nomination was duly prepared, signed and executed by the proper officers for filing in the office of the secretary of the commonwealth, but by some oversight or neglect it was not filed within the time required by law, and the effort is now made to nominate the same candidates by nomination papers as the candidates of the Republican party.

Section 3 of the act approved July 9, 1897, provides as follows: "Provided that no words shall be used in any nomination paper to describe or designate the party or policy, or political appellation, represented by the candidate named in such nomination papers as aforesaid, identical with the words used for the like purpose in certificates of nomination made by a convention of delegates, or primary meeting of electors, or caucus, held under the rules of a political party, or any board authorized to certify nominations, representing a political party which at the last preceding election, polled two per centum of the largest vote cast."

This section clearly prohibits the use of the name of a party on nomination papers in the district where the party is entitled to nominate by certificate of nomination, and therefore these nomination papers, although filed by parties entitled under the act to file the same, are defective in this, that they are forbidden to use the words in these papers to describe or designate the party or policy represented by their candidates which they have used and which designate a party or policy well known as the Republican party. In this respect the nomination papers are defective and cannot be sustained unless amended.

Wherefore the papers as filed are hereby adjudged to be defective, and leave is given to the persons who have signed and filed the same to amend by changing the name Republican within five days after notice of this order, a copy of which the prothonotary is directed to certify to the secretary of the commonwealth.

For objections, *Snodgrass & Snodgrass* and *G. H. Davies.*

Contra, *J. A. Stranahan.*

From Paul A. Kunkel, Esq., Harrisburg, Pa.

A Japanese View of Trial by Jury.

Our Japanese allies are endeavoring so to improve their legal system that it should earn the praise of Western nations. The Japanese government, early this year, appointed a commissioner to go on an extensive tour of investigation. That gentleman, Mr. R. Hayashi, a prominent Japanese barrister-at-law, explained in an interview with a *Daily Chronicle* representative that some aspects of the administration of British justice have struck him most favorably; but others, notably trial by jury, will assuredly not form part of the recommendations which he will ultimately submit to the legislators of Japan. "There is far too much theory in Japan," said Mr. Hayashi, in recording some of the conclusions at which he has arrived. "Our judges at home may be learned in the law, but they do not apply their knowledge to the principles of everyday life as they ought. Now your judges are excellent. They are very practical, and they take a common-sense view of the cases they try. And look at their experience! We have nothing like it in Japan. Some of our judges are very young. They do not have any previous training at the bar as do the judges in this country. They have to pass two examinations, separated by an interval of two years, and during that time they receive some practical training in their work. But really our judges should be drawn from the bar; and that is one of the reforms that I should recommend." When the subject of trial by jury was mentioned, Mr. Hayashi smiled broadly. "No, it won't do for Japan," he said. "I have seen several of your juries. How easily they are carried away by an eloquent lawyer!" It was suggested to Mr. Hayashi that the jury looked at the case before them as men of the

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world. "What of the judge?" he retorted. "Surely he has knowledge of the world. Besides, the jury don't know the points of the law, whereas, with his legal mind, the judge is able to appreciate the value of every piece of evidence."—*From the Law Student's Helper, London.*

CHARITABLE INSTITUTIONS — INJURIES TO SERVANTS. The Supreme Court of New Hampshire in Hewett v. Woman's Hospital Aid Ass'n, 64 Atlantic Reporter, 190, holds that a hospital conducted as a chairity is liable for the negligence of its manager in failing to notify a nurse of the contagious nature of a case assigned to her. The court points out that the hospital is incorporated under a general charter, and that although it has no capital stock and made no division of profits, and all its property was devoted to charitable uses, it is liable, and cites a number of English and American cases. The court also rejected the contention that as the plaintiff was an apprentice learning a trade, she was not a servant, and that the corporation was therefore relieved of its ordinary duty to her in that capacity.

STEALING GAS. An unusual prosecution for larceny arises in Woods v. People, 78 Northeastern Reporter, 607, where the Supreme Court of Illinois holds that the occupant of a building, who removes the meters and substitutes rubber hose connections, is guilty of grand larceny under the statute defining larceny as feloniously taking the personal goods of another. The defendant's plan was to remove the meter as soon as the gas inspector had read it, and connect the pipes by means of rubber hose, this connection being left in place uutil near the time for the reappearance of the gas man, when it was removed and the meters replaced. It was also held in this case that in ascertaining whether the value of the gas taken was sufficient to make the offense grand larceny, the value of the gas consumed upon a number of consecutive days should be added together, and that the gas taken on each separate day did not constitute a separate offense. It was further held that in ascertaining the value, the jury should be guided by the selling price and not by the cost price of gas.

That a purchaser of grain has resold it, and has not refunded the purchase price on discovering a shortage is, held, in Denton v. Fisher (Md) 3 L. R. A. (N. S.) 465, not to defeat his right to maintain an action against his vendor for the shortage.

Foundations and walls of a building of which different floors are leased to different tenants are held, in Miles v. Tracey (Ky.) 4 L. R. A. (N. S.) 1142, not to be in the landlord's possession, within the rule as to his liability for defects in portions remaining within his control.

The election by a widow, for nine years, to accept the terms of her husband's will, which dealt with certain land in her name as if it were his, which her heirs had acquiesced in for eight years after her death, is held, in Hoggard v. Jordan (N. C.) 4 L. R. A. (N. S.) 1065, to preclude her administrator from dealing with the land as hers to pay debts.

The District Court, Eastern District of Pennsylvania, has held, in Matter of International Coal Mining Co., 16 Am. B. R. 309, that the Pennsylvania Act of April 7, 1870, under the property of an insolvent corporation may be sold for distribution of of the proceeds among its creditors, is in effect an insolvency law, and the operation of the Bankruptcy Act, 1898, cannot be defeated by proceedings taken under the state law.

Where judgment has been recovered against a bankrupt upon a dischargeable claim, held, by the U. S. Circuit Court of Appeals, Second Circuit, in the case of Matter of Adler, 16 Am. B. R. 414, that the Bankruptcy Court may, in its discretion, restrain the judgment creditor from attempting to enforce its judgment, until twelve months after the date of the adjudication in bankruptcy, or until the question of the bankrupt's discharge is determined.

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PITTSBURGH, PA., JANUARY 2, 1907.

Court of Common Pleas No. 2,

ALLEGHENY COUNTY.

HILL TOP SAVINGS & TRUST CO. v. WORLEY et al.

Joint estate — Sale on execution—Judgment against one tenant.

Husband and wife owning real estate by entireties executed a mortgage to A and subsequently judgments were entered against the husband. A foreclosed the mortgage and on the sale on *lev. fa.* there was a balance on hands after payment of the mortgage which the sheriff paid into court.

Held, that as the wife had a right to have this balance paid to herself and husband jointly, this right could not be affected by the judgments and the money should be paid out as if the judgments did not exist.

Lev. Fa. No. 58 April Term, 1906.

Opinion by SHAFER, J. Filed May 24, 1906.

It appears from the record in this case that Jesse R. Worley and Nevada Worley, his wife, were the owners by entireties of a tract of land in this county upon which they made a joint mortgage which was duly recorded; that afterwards judgments were recovered against Jesse R. Worley, and that thereafter the land was sold by the sheriff on a *lev. fa.* issued on the mortgage, and that after payment of the costs and the mortgage there remained for distribution in the hands of the sheriff the sum of $902.14, which the sheriff paid into the court for distribution. On the petition of Nevada Worley a rule was granted on the judgment creditors of Jesse Worley above mentioned to show cause why the money so paid into court should not be paid to the defendants notwithstanding the judgments. The status of a judgment against the husband under the circumstances above detailed does not seem to have been passed upon by the Supreme Court.

The Married Women's Act of 1848 disables the husband from in any way incumbering his wife's real estate. If there were no judgments against the husband, the money in question would be payable to the defendant's jointly, and it is the right of the wife to have the money so paid. If judgments against the husband were allowed in any way to modify or affect such distribution they would to that extent incumber the wife's property. We are of opinion therefore that the existence of these judgments can have no effect upon the distribution and that the money in court must be paid out as if the judgments did not exist. The same conclusion was arrived at in a similar case by Judge Miller of Mercer county, in *Leet* v. *Miller*, 6 D. R. 725, which is the only case to which we have been referred.

The rule is therefore made absolute and the prothonotary is ordered and directed to pay to Jesse R. Worley and Nevada Worley, his wife, the sum of $902.14, paid into court by the sheriff herein, less poundage.

For plaintiff, *Frank I. Gosser.*

For defendants, *Wm. E. Best.*

(Common Pleas No. 2, Allegheny Co.)

SNYDER v. GUTHRIE et al.

Bankruptcy—Discharge—Judgment creditor—Following exempt property.

A having certain notes against B with power of attorney to confess judgment and a waiver of exemption entered judgment on the notes. Before their maturity B was declared a bankrupt and an execution attachment was issued claiming B's exempt property was in the trustee's hands. B was discharged in bankruptcy and filed a petition to open the judgment.

Held, that the bankruptcy law did not prohibit the bringing suit or obtaining judgment against one declared a bankrupt. The judgment was not void or voidable.

That if plaintiff attempted to use the judgment in any way inconsistent with rights acquired by the bankrupt by his discharge such proceedings should be stayed, but he was not entitled to have the judgment opened.

D. S. B. No. 23 April Term, 1906. Sur rule to open judgment.

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Opinion by SHAFER J. Filed July 16, 1906.

The facts in this case are not in dispute, and from the petition and answer it appears that the plaintiff had one or more notes signed by the defendants with a warranty of attorney to confess judgment thereon and waiver of the exemption laws; that before the maturity of these notes the defendant, Guthrie, was adjudged a bankrupt; that thereafter judgment was entered on these notes, being the judgment in question in this case; that when the notes came due an execution attachment was issued upon the judgment and served upon the trustee in bankruptcy who was alleged to have in his possession the exempt property of the bankrupt, and that sometime after the service of that attachment the defendant, Guthrie, received his discharge in bankruptcy.

The present application is to have the judgment opened to allow the defendant, Guthrie, to plead his discharge. We do not understand that there is any provision of the bankrupt law which forbids the bringing of a suit against one who has been adjudged a bankrupt or the recovery of a judgment therein. Such suits or proceedings on judgments therein may be stayed by the bankrupt court, but the judgment is not either void or voidable, and the plaintiff has a right to pursue his remedy thereon against the exempt property of the bankrupt if the state laws permit him to do so, and it was held by the Supreme Court of the United States in the case of *Lockwood* v. *Exchange Bank*, 190 U. S. 294, that the bankrupt court ought to withhold the discharge of the bankrupt in such a case to give the creditor thus attempting to follow the exempt property of the bankrupt an opportunity to do so under the state laws.

In considering the present application we have nothing to do with the question whether or not the exempt property of the bankrupt has been duly attached or not. If the plaintiff attempts to use the judgment in any way inconsistent with the rights acquired by the bankrupt by his discharge such proceedings must of course be stayed, but the defendant is not entitled for that reason to have the judgment opened.

The rule is therefore discharged.

For plaintiff, *S. M. Cunningham.*
For defendants, *Albert York Smith.*

LEGISLATIVE AND OTHER CHANGES IN COURTS.

BY WILLIAM MACRUM, ESQ.

Two years ago, when the total of jury cases at issue in the three common pleas courts of Allegheny county was about 4,000, the legislature passed acts for the establishment of two separate additional courts, each to consist of three judges. Governor Pennypacker vetoed these measures, and they were not passed over his veto. A month or two ago it was estimated that the number of jury cases then at issue in the three courts was 5,352; and it is argued from this that there is still an equal or greater need for two additional courts, six additional judges.

It is to be noted that the annual engagement of at least one of the judges in the non-judicial, purely administrative business of licensing vendors of liquor, takes time proportionate to the care exercised in endeavoring, in each of the multitude of cases, to get at the facts in a manner that comports with the dignity of the bench and the wholesome traditions that must control the action of a judge, even in such matters. A multitude of other administrative affairs such as street and sewer improvements, involve very few controversies really judicial, and are subject to the same difficulties in getting at the truth of the "prudential" questions, chief among which is the apportionment of the benefit tax. This involves discretion, but not judicial discretion. Where property is taken, injured or destroyed, and the compensation remains in dispute, this and this alone of all matters in affirmance of the proceeding, becomes properly a question for a judicial tribunal. The present constitution, which voiced for the silent masses of the governed a profound and well-founded distrust of all administration tainted with "politics." guarantees the right to revision by a jury of any assessment of damages for such taking injury or destruction, where the owner of property alleged to be injuriously affected will appeal and take the consequences. The right so to contest a benefit assessment ex-

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ists by mere construction of the act of 1891, etc., perhaps suggested partly by the same danger of reckless confiscation, and partly the mixed-up and cumbrous "administrative" procedure introduced by the act, and supposed to be required by one extreme and surprising ruling of the Supreme Court.

The validity of the municipal action might be drawn in question and passed on by ordinary judicial proceedings.

A multitude of similar administrative matters, only potentially involving judicial controversies, consume the time of the quarter sessions and common pleas courts throughout the state. The cumulation of these functions upon the courts merely marks the fact that in the provincial stage of our development the legal profession, and therefore the courts, have been better fitted to perform public duties, because of higher ethical standards of official conduct, maintained and enforced by a more efficient discipline within their ranks, and also by greater familiarity with pubic law than other classes of the community. But because of the diffusion among these of knowledge and wealth, and political training, and the vast increase in the volume and complexity of administrative functions—if not in consequence of laxer discipline, "commercial" standards, machine politics, and other sordid entanglements among the lawyers—the courts and their practitioners must narrow their field or suffer discredit of one kind or another. There are signs of an informing, an awakening of the public conscience which, if lasting, will tend to a purer, more public-spirited conduct of the government in all departments. It will be but a salutary reversion to the sound principles of our constitution to confine the courts more and more closely to their proper judicial duties. The only desideratum is an honest body of men to occupy the field thus evacuated.

An opinion of the late Judge White declining to appoint, under the act of 1875, a board of assessors for Pittsburgh, 7 Legal Gazette 117, may well be brought to the attention of this bar.

The reasons he gives against mixing the judges up in matters of political patronage, and heaping extra judicial functions on them that obstruct the discharge of their proper duties, should have been heeded. He cites Hayburn's Case, 2 Dall. 409; Chief Justice Taney's Note to U. S. v. Ferreira, 13 How. 52, and that case itself. And see particularly Judge White's own text in last two paragraphs in column 1, sq. of page 119.

Sutherland. Notes on the Const. of U. S., pages 499-501, and cases cited. See also Black Am. Const. Law, p. 72, sq. 75-6 sq., 78 sq. . . . "neither should be charged with duties foreign to the field of its legitimate activity." And p. 83: a statute authorizing a court to assess a tax, orders a judicial tribunal to do a legidative (or executive?) act; citing cases.

II.

But other causes have operated within the past year or two to add to existing arrearages. Owing probably to the protracted strain of extra judicial work, done with an exact adherence to judicial form, an anxious regard for the public interest, and a desire to wrong no man, one of our judges was for a considerable period disabled; another, after having well and bravely and diligently and unostentatiously served his country and state throughout a long life, has died. Two or three cases of quite exceptional difficulty have taken weeks of the time of the judges who tried them. But for these and other rather exceptional conditions the arrearages might have been much less, instead of a little more, than they happened to be when quoted for the same purpose before. It is to be noted that they have not increased in a constant ratio in any one of the courts.

III.

A judge cannot administer justice satisfactorily if, day in and day out for months at a stretch, he is kept in harness and driven like a carthorse. He should have ample leisure for reflection, general and special study, recreation. All the judges I have ever known, here and elsewhere, have enjoyed the work which previous training has specially fitted them to do successfully and with credit. The infinite variety presented in the cases litigated, all reflecting the life of the time, saves judges and lawyers from the deadly monotony that characterizes many occupations; so that sloth or the disposition to shirk work proper for a court is not the vice of those members of the profes-

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sion who have been tried and found worthy of judicial honors. Freed from distracting matter that ought not to occupy their attention at all, the present corps of judges could no doubt easily bring up arrears, and for a long time to come cope with the growing judicial business of the county.

IV.

Standing rules have done a good deal in this county to relieve the courts of routine not involving the merits of controversies; but much of this kind of business is still transacted in open court, commonly with two or three judges on the bench. In Philadelphia, because of the control of the office by the courts, and in the rural counties because usually the bars exercise some degree of control there, the prothonotary does not hold a purely political sinecure. There is no good reason why the bar should not exert itself to make an entirely non-partisan nomination or nominations for this important office, so as to put into it a lawyer competent to act as a standing master, with assistants of like competency, if necessary, empowered by a rule, or if requisite by statute to do a good deal of what the masters do in the modern English practise, relieving the courts of nearly everything but the final adjudication of controversies. Attention is called to three articles by Thomas Leaming, Esq., in *The Green Bag*, on "Present English Practise," containing an account of the rapid dispatch of routine, preliminary, or minor matters by masters, and also, what is of at least equal value, an account of the way the ground is cleared and the issues developed in preparation for the trial, so that the latter proceeds deliberately, but without delays from technical objections, surprises, and tricks, to a result that is not to be upset unless on a controlling and doubtful point—the very crux of the litigation. This is what courts sit for. Some years ago a gentleman who, apart from party politics, would have been the choice of the bar, so admirably was he qualified in every way for the office, or a much higher one, consented to become the candidate of the minority party. But the majority of the bar helped to defeat him and to elect a mere placeholder.

It seemed to Governor Pennypacker, when beset with a shoal of applications for the six expected offices long before the acts creating them were submitted to him, that the whole movement was prompted rather by the applicants than by any unbiased regard for the interests and rights of litigants. There is room for the suspicion that the latter are the least part of the real "push," however much they and their counsel are disposed to accept any measure of relief, and incidentally to gratify good friends and good fellows who want a further sub-division, in their favor, of the honors of the bench.

Again reference is made to current "literature" bearing on this subject of lawyers' duties to clients and to the state: a lay sermon delivered by William Draper Lewis at the last meeting of the American Bar Association (section of Legal Education) on the "Failure of the Bar to Perform Its Public Duties." The address is printed in the November number of the *American Law Register*, Vol. 54 O. S., page 629.

V.

Concert of action between opposing counsel in developing and defining the real issues of fact and the disputed evidentiary facts would do more than anything else to shorten trials. The courts could aid this by adhering to more certain and uniform rules in passing on demurrers to the whole or to parts of claims and defenses (or—to use the circumlocution proper only in the infancy of the modern practise—*rules to show cause why judgment for want of sufficient affidavit of defense should not be entered against defendant for a part or the whole of the amount claimed*).

The practise of settling and disposing of issues of law requiring that claims and defenses be set forth in reasonably accurate (certain) language on pain of suffering judgment, has fallen into desuetude, innocuous only to the slovenly or chicaning pleader, or to the client whose fraud or refusal or inability to see his mistake can be hid *in generalibus*." Often a clear statement of a claim or defense in correct, duly certain pleading language, with more (instead of less) particularity as to the ultimate facts, "the nature and character" of the claim or defence than some common-law forms exacted, would convince an honest party that he could not go on—could not swear the case through, even to a jury trial.

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The practise of calling for a plea that means nothing, and putting all controverted cases on the trial list, tho they involve nothing but a question or questions of law, wastes time at every step; the time wasted in getting the case set down and called, especially if delay be the wish of one side; the time and money of other litigants, their witnesses and counsel, kept waiting; the sacrifice of the time of all in attendance in getting a functionless jury into the box, often after eight challenges; the time lost for all these in putting in the untenable claim or defence, in a rambling way through the mouths of witnesses; the time lost over motions for binding instructions or for nonsuits, motions for new trials, etc.

In the preparation for and conduct of the trial the courts should encourage, if not require, counsel and parties to take a leaf out of the book of our bewigged English cousins who have got far ahead of us during the last thirty years in the business-like administration of justice; to forego the laying of dishonest traps and pitfalls, the interposing of objections merely confusing and obstructive, or at the most not materially conducing to the great end in view: a well-considered verdict on the whole merits of the case, usually not even sought to be set aside.

VI.

Such reforms as these, and others that have been more authoritatively suggested; and above all a bona fide effort of counsel to aid the existing courts all along the line in the systematic handling and dispatch of necessary business, would probably enable them to cope with it comfortably. But if increase of judicial force is needed, would it not be more economically applied by adding one or two judges to one or more of the three courts, especially as the growing equity and criminal business depletes too much a common pleas bench of only three members?

It has been seriously objected by very able lawyers that the present constitution disables the legislature from adding even one judge to each court whenever there are three or more courts in any one county. Even if we accepted this remarkable construction, four judges in two of the courts or five in one would still be consistent with it; but any lawyer or intelligent layman who without bias will read together the applicable clauses (sections 5 and 6 Art. V.) must see that no such absurd and repugnant limitation on legislative discretion for all time to come can be read into them, but that they are very explicit to the contrary. The error has arisen by assuming that this is "the State of Allegheny," and excluding from consideration not only the smaller counties but Philadelphia.

By section 5, whenever a county has 40,000 inhabitants it shall be a separate judicial district and have, at the outset, but one judge, who must be learned in the law; but the legislature shall provide for additional judges, as the business of said districts may require. While below the 40,000 standard, counties are to be united into convenient single districts or attached to any contiguous district, as the legislature may provide.

Section 6 constitutes for Philadelphia *four*, for Allegheny *two* "distinct and separate courts of equal and co-ordinate jurisdiction, composed of three judges each; . . . . but the number of said courts may be by law increased from time to time; . . . the number of judges *in any* of said courts, *or in any county where the establishment of an additional court may be authorized by law*, may be increased from time to time; and whenever such increase (i. e., in *any* of said courts, or in any county where, etc.) shall amount in the whole to three, such three judges shall compose a distinct and separate court as aforesaid," numbered in series with the old ones.

Note that the express provision for increase applied and still applies to the four, now five, Philadelphia common pleas. Could the convention have intended, after providing for increasing the number of judges in *any* of said courts, to prohibit the addition of one judge to *each of these four?* Is it not plain that each and all of these four, and of the potential five, six, or dozen courts in this or any other county, are within the words and meaning of this clause? It is indeed at first blush dobutful whether section 26 of Art. V, does not limit the legislative discretion to uniformity even in number of judges for any particular county; but if this merely collateral provision necessarily

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limits the legislative discretion recognized by the provision for increase of any *one* court, there is a repugnancy between these two parts of the text. But I think uniformity to that extreme is not required. Can it be that the express permission of progressive increase of each, up to five, was intended to be capriciously defeated, so that only one judge could be added to one or two of the four courts, or perhaps two to one of them; and that whenever, at any distance of time, the increase in *all* amounts to three, *all* must again be reduced to distinct courts of but three judges, often with an improper and indeterminate fraction left over. The language is not *all* of said courts, or said courts collectively, but *any* of said courts, which imports: any *one* of said distinct and separate entities. Is it not obvious that for each and every single-county district or even for united or attached counties the provision contemplates as many courts as the legislative discretion deems necessary from time to time, and a membership of from three to five.

Even if the import of the words was doubtful, the subject is such that every presumption is to be made of an intent *not* to hamper the exercise of legislative discretion, or to be wiser than time, and attempt provision *in perpetuum* for the unforseeable needs of posterity. No such fatuity can be imputed to the convention in framing, or the people in adopting, or the courts in construing, these regulations. Their purview is, not to check or balance great governmental powers, or guarantee the liberty of the individual, but merely to negative any suggestion of an interregnum, enact urgent reforms, provide machinery adjustable to public needs as they may arise. They introduced an organization adapted to existing needs, and merely outlined the way in which it might be expanded; but by the very words of section 4 and of this section 6, the common pleas, "*until otherwise directed by law*" continue as before, "except as herein changed," and in the two great counties "all the jurisdiction and powers now vested in the district courts and courts of common pleas, subject to such changes as may be made by this constitution *or by law* shall be in Philadelphia vested in four, in Allegheny in two," etc.

Under the decisions construing like expressions and provisions in the earlier constitutions, a knowledge of which construction is to be imputed to the framers of the present one, it might even be considered a fairly arguable proposition that the provision for separate courts of from one to three, four or five members in the less important districts and three to five in the two great ones, is but temporary and subject to legislative change. It seems pretty clear that if, e. g., Philadelphia or Allegheny decayed, or was divided, an act reducing the number of courts and judges would be a constitutional and proper exercise of legislative discretion. In like manner, while no permission to create additional judgeships for united or attached counties is expressly given, the constitutional and inherent sovereign discretion of the legislature to do so can hardly be validly limited by the argument that the mandate, "shall provide for additional judges" for single-county districts implies a *shall not provide them*, for the two, three or four counties of a union-district, or for an "attached" county. If any learned reader wishes to compare these suggestions with the doctrine of the court let him look at, *inter alia*, Emerick v. Harris, 1 Binn 416; Com. v. Smith, 4 Binn 117; Com. Zephon, 8 W. & S. 382; Com. v. Nathans, 2 Pa. 138; Com. v. Martin, 2 Pa. 244; In re Pa. Hall, 5 Pa. 204; In re Northern L. Hose Co., 13 Pa. 193; Kilpatrick v. Com., 31 Pa. 198; Foust v. Com., 33 Pa. 338; Com. v. Green, 58 Pa. 226; Brown v. Com., 73 Pa. 321; Com. Gamble, 62 Pa. 343; In re President Judge, Etc., 64 Pa. 33; Com. v. Hipple, 69 Pa. 9; Com. v. Bell, 4 Super. Ct. 187; Morgan v. Reel, 113 Pa. 81, 86.

On the whole, it would seem that the addition of one or two judges to some or all of our existing courts, would be a better provision for distributing and dispatching the business than the creation of one or two new courts without business at the beginning, and without the benefit of daily contact and consultation with judges who have had some years' experience, and have plenty of business of every kind ready to be allotted to the new judges according to their special aptitudes. It will be well worth while, too, to urge the judges, after the increase, to put in

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force the act of March 9, 1885, P. L. 5: "That in all counties in which there are two or more courts of common pleas the judges of any of said courts shall at the request of any of the other courts of common pleas of the same county have full authority to perform any judicial duty in such other courts with the same effect as if they were members thereof. Provided, that nothing in this act shall be construed to entitle a judge so called upon to act for another, to receive extra compensation therefor.

Up to this time the act has been a dead letter in Philadelphia as well as here, except that in the summer vacation any judge approves bonds and grants rules in courts other than his own.

Lack of Mutuality of Remedy as a Defense to Specific Performance.

By the old orthodox rule, unless the defendant should in turn be entitled to an equitable remedy, the plaintiff took nothing by his bill for specific performance: Cooper v. Pena, 21 Cal. 403. This remedy must have existed when the contract was made. Subsequent accrual of it to the defendant did not add the requisite mutuality; (Norris v. Fox, 45 Fed. Rep. 406) subsequent loss of it to him, even by act of God, (Stapilton v. Stapilton, 1 Atk. 2; Moore's Admrs. v. Fitz Randolph, 6 Leigh (Va.) 175) much less by his own laches, (Eastern Counties Railway Co. v. Hawkes, 5 H. L. Cas. 331) did not remove it. Two classes of exceptions were allowed. It was an answer to the plea that the plaintiff, though not so compellable in equity, had performed in full; (Univ. of Des Moines v. Polk County Homestead & Trust Co., 87 Ia. 36) likewise, that he had elected to proceed with a contract voidable at his option: See Ames, Mutuality in Specific Performance, 3 Columbia L. Rev. 1, and cases cited. Thoughtful courts have in part demolished these artificial rules. Mutuality of equitable remedy is no longer generally demanded, (Northern Central Railway v. Walworth, 193 Pa. 207; Lamprey v. St. Paul & Chicago Railway, 89 Minn. 187) nor need it exist at the time of the bargan: Blanton v. Ky. Distilleries Co., 120 Fed. Rep. 318. A recent federal decision, however, restates the former of these discredited doctrines: General Electric Co. v. Westinghouse Electric Co., 144 Fed. Rep. 458 (Circ. Ct., N. D. N. Y.)

In passing upon a bill for specific performance certain considerations must commend themselves to the Chancellor. If the defendant has already had full performance, it no longer lies in his mouth to talk remedies. Further, if some remedy lie open to him, adequate either to assure him counter-performance or to compensate him on breach, he may not be heard to quibble over the precise form it shall take. Still less is it an answer that he was once remediless. Equity distinguishes between unfair, one-sided bargains, and fair, two-sided bargains which, because of wise policy of law, one party may elect to repudiate. Equity refuses to aid the former, but she would be untrue to herself if she made a preliminary disability in the latter, removable by election to proceed, pretext for staying her hand. Although all this is now generally well settled, confusion still arises from failure to distinguish from true lack of mutuality defenses grounded on the unfair consequences of specific performance. In granting the plaintiff the largest measure of equitable relief courts must look at the situation which a decree will create. It must not be such as to prejudice the defendants chances of obtaining his equivalent. A ball-player must not be enjoined from playing on another team if, upon his later repentance and his manager's refusal again to employ him, he may find the decree has lost him his market. That the plaintiff in such cases takes nothing by his bill is due, not to the like-for-like doctrine of the old law, but to the unfair consequences to the defendant's position that might flow from the decree.

Some contracts, however, from their nature admit on one side of adequate remedy at law or in equity, but not on the other, as in the case of an agreement to supply a peculiar chemical compound: Hills v. Croll, 2 Phill. 60. Nothing short of voluntary performance can cure the inherent infirmity of one party's position. But here it is argued that if specific performance to the plaintiff work no prejudice to the defendant's position, involve neither payment of considera-

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tion without security for the equivalent nor forfeiture of market, the defendant's plight must not restrain the chancellor. The bargain is of his own seeking. The decree will not add to his sorrows. Performance, though specifically decreed to the plaintiff, will be *pari passu*. Self-help will bar forfeiture, for if ever the plaintiff cease to perform, the defendant will be instantly discharged from operation of the decree. It is submitted that this is the true case of lack of mutuality of remedy. The machinery of equity is here working a real preference by giving the plaintiff the whip-hand. At pleasure he can drive on the bargain or elect to halt. The defendant's initiative is paralyzed. He must take his cue from the caprice of the plaintiff and damages at law cannot satisfy. It would seem that along with the non-weakening of the defendant's position there should also exist some compelling policy of public welfare to incline equity to increase this inequality between the parties by granting specific performance to the plaintiff.—*Harvard Law Review.*

SUNDAY LAWS. (SLOT MACHINES.) S. C.

A case in which a rather novel point of law was raised is that of Cain v. Daly, 55 Southeastern Reporter 110. It was there urged that as a Sunday law merely prohibited the labor of persons on the Sabbath, and as it was penal it could not be so construed as to embrace automatic machines. In answering this contention and holding that sales by automatic or slot machines were included within the statute, the court says that while no case directly in point has been found, the language of the statute is plain and its purpose is to prevent the selling and buying of goods, wares and merchandise on the Lord's Day, and its intention is to prevent opportunity for buying as well as the act of selling on Sunday. The goods in the slot machines are exposed to sale as effectually as if the owner or operator were present exhibiting the goods and delivering them on receipt of the price, and it would in a large measure annul the Sunday law if such contrivances to evade it should be held successful. It may be, the court says, that the law-makers in 1691 had no conception of such vending machines, but that cannot be affirmed of the law-makers in 1902 when the statute was re-enacted.—*The Green Bag.*

A bill of review because of newly discovered evidence is held, in Safe Deposit & T. Co. v. Gittings, (Md.) 4 L. R. A. (N. S.) 865, to be maintainable in the lower court after a decision on appeal.

A sale of real estate by an executor to the surety on his bond, under an order of court obtained by fraud, is held, in Fincke v. Bundrick (Kan.) 4 L. R. A. (N.S.) 820, to be void, though the purchaser was innocent.

Notes, mortgages, and other evidences of indebtedness from residents of the state to a non-resident creditor are held, in Gilbertson v. Oliver (Iowa) 4 L. R. A. (N. S.) 953, not to be subject to succession taxes at the debtor's residence.

The Court of Appeals of the state of New York has very recently held in Rand v. Iowa Central Railway Co., 16 Am. B. R. 692, that where no trustee was ever appointed, a bankrupt, in an action for services rendered is not precluded from recovering, by the fact of his adjudication after the cause of action had accrued and before the commencement of the suits.

Where more than four months prior to adjudication a bankrupt, in furtherance of repeated promises to secure his wife for money borrowed from time to time, executed a deed of trust upon a certain farm to secure payment of his debt to her in consideration of her joining in another deed of trust on the same day, by which she surrendered her contingent right of dower in and to his farm to the extent of $12,500 of its value, it is held in Moore v. Green, 16 Am. B. R. 648, that she is not entitled to an equitable mortgage operating as a valid lien for the amount of her debt irrespective of the trust deed, nor does she by the relinquishment of her dower occupy any vantage ground against the creditors of her husband except as to her commuted dower in the property that she surrendered.

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PITTSBURGH, PA., JANUARY 9, 1907.

Court of Common Pleas No. 2,

ALLEGHENY COUNTY.

In the Matter of Appeal of the Board for the Assessment and Revision of Taxes From Decision of the Salary Board.

Board of assessors—Act of March 24, 1905—Appointment of clerks—Salary board—Act of May 8, 1854.

The act of March 24, 1905, creating a board for the assessment and revision of taxes provided for the appointment by the board of such clerks as the salary board may allow. The salary board was created by the act of March 31, 1876. Held, The salary board composed of the three commissioners, the controller and the board of assessors, the latter having one vote should determine the number and compensation of the clerks to be employed.

The clerks should be selected and appointed by the board of assessors.

As the act of May 8, 1854, requires the commissioners to furnish the school boards with copies of the assessment and the act of 1905 does not refer to the subject this duty is still with the commissioners.

No. 268 October Term, 1906.

Opinion by SHAFER, J. Filed October 24, 1906.

Upon appeal taken by the Board for the assessment and revision of taxes from a decision of the Salary Board in regard to the employment of clerks, the appellant and the Salary Board and county commissioners have agreed upon the facts upon which the appeal is to be determined.

The appellant board was created by act of March 24, 1905, which provides that in certain counties, of which Allegheny county is one, all assessments of property for state and county purposes shall be made by a board of three persons to be appointed as therein provided; that this board shall divide the county into convenient districts and appoint assessors therein who shall make assessments of all property in their respective districts and file the same with the board, and that the board shall thereupon revise the valuations, and thereafter fix convenient times for hearing appeals, and that after the determination of such appeals the valuations so made shall stand as the valuations of all assessments for county and state taxes until the next triennial assessments, with power to revise the assessments in the meantime by adding omitted subjects of taxation and revising valuations, and making it the duty of the board to furnish any taxpayer upon request with a statement of his taxable property and its valuation, and requiring the board in case of a change of assessments in the intervals between triennial assessments to serve notice on the taxpayer affected by the change in the manner directed in the act. The act further provides that the subordinate assessors to be appointed by the board shall receive the sum of three dollars per day, and that the board shall have the right to appoint such clerks as the salary board may allow for the proper discharge of the duties of said board, and all salaries and expenses shall be paid out of the county treasury.

The salary board is created by section 7 of the act of March 31, 1876, which provides that the county commissioners and county controller, where such office exists in counties coming under the provisions of the act, shall be a board whose duty it shall be to meet from time to time as may be required by any officers whose salaries are established by the act, for the purpose of ascertaining the number of clerks required for the proper discharge of business by each of said officers, and for fixing the salaries of each of said clerks, and that whenever the board is assembled to consider the case of any of said offices, the officer holding it shall sit as a member of the board while his case is under consideration and that the decision of the majority shall govern, and further that if the decision of the board shall be adverse to the claim of the officer whose case is under consideration, he may appeal

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to the judge or judges of the court of common pleas of the county, who shall hear such appeal, and whose decision thereon shall be final. The act provides in the first section that "all fees limited and appointed by law to be received by every county officer therein elected . . or appointed according to law . . . shall belong to the county." The 12th, 13th and 14th sections of the act fix the salaries of various officers in counties of various numbers of inhabitants, and the 15th section provides that these salaries shall be in lieu of all fees heretofore provided by law.

The substantial question raised by the appeal appears to be what effect is to be given to the provision of the act above quoted that the board shall have the right to appoint such clerks as the salary board may allow. As we understand the contention of the commissioners and controller, forming a majority of the salary board, it is that the commissioners and controller alone without any representation of the board of assessors is the salary board referred to, and that the board of assessment can appoint clerks only by the consent of the controller and commissioners or a majority of them, no provision being made for determination of their salaries by any one unless that be involved in the expression, "such clerks," etc. The contention of the assessment board, on the other hand, we understand to be that by the reference of the subject of employment of clerks to the salary board contained in the act it is meant that the whole subject of the employment of clerks by the board of assessment, their number and the salaries to be paid to each of them is to be determined by the salary board as constituted by the act of 1876, in the same manner as if the assessment board had existed at that time and the salaries of its members had been fixed by that act. The county commissioners further contend as distinct from the contention of the commissioners and controller that the clerks, which are admitted by the case stated to be necessary for the performance of certain work therein described, are to be appointed by them and not by the board of assessment.

As we understand the act appointing the board of assessment it abolishes the office of assessor heretofore existing, so far as respects the assessment of taxes, and takes away from the county commissioners all duties imposed and powers conferred upon them by previous acts in regard to the assessment and valuation of lands and personal property for purposes of taxation. As the law stood before this act, assessors were elected in their respective districts, reported their assessment to the county commissioners who heard appeals therefrom as a board of revision, and the books containing the assessments remained with the commissioners to whom they were returned. The act of 1905 requires these assessments to be returned to the board and requires the board to act upon them by way of revision from time to time. The act makes no provision for certifying to the commissioners the assessments so made, but provides that the valuations ascertained and revised after appeal "shall stand as the valuations for the assessments of all county and state taxes until the next triennial assessment."

The first question to be determined is what is meant by the provision of the act of 1905 as to the appointment of such clerks as the salary board may allow? The salary board here referred to can be no other than that which is created by the act of 1876, and as that act gives authority to a salary board to ascertain the number of clerks and the proper salaries of clerks to be employed by various officers, in a certain form of proceeding prescribed in the act, it seems plain that the act of 1905, by the words in question, substantially directs that the number of clerks to be employed by the board of assessment and their compensation shall be fixed by a salary board constituted as that provided in the act of 1876, acting in the manner provided in that act. If this interpretation is adopted, the system of fixing the number and compensation of clerks will remain uniform in all the offices in the county, and, if not, we shall have the anomaly of a board which is directed to do certain things which manifestly require the appointment of clerks and yet placed completely at the mercy of the commissioners and controller, as to the number of clerks at least, without any appeal. It is an objection to the interpretation here adopted that

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the board of assessment consists of three officers instead of one, and that if the whole three are to sit as members of the salary board under the act of 1876 they will be given an advantage over other officers. The board of assessment, however, claims to have but one voice in the salary board, and we are inclined to think that a proper interpretation of the act would give them but one vote. We are of opinion, therefore, that the subject-matter of the number and compensation of the clerks to be employed by the board of assessment is to be determined by a salary board consisting of the three commissioners, the controller and the board of assessment, the latter board having, however, but one vote, and that an appeal lies by the board of assessment from the action of the salary board so constituted to the judges of the common pleas.

The remaining question is as to whether clerks who are admittedly necessary to do certain work are to be employed by the board of assessment or by the commissioners? This must, of course, be determined by determing whose duty it is to do the work. As all duties connected with the assessment of taxes heretofore imposed on the commissioners have been taken away and given to the board of assessment, it follows that all the necessary clerical work for the making and completion of assessments must belong to the office of the board of assessment and also for the performance of all such duties connected with the assessment as are imposed by the act upon the board, to be performed after the assessment is made. It seems to us plain, therefore, that the writing up of the assessment blotters and the work incident thereto as described in paragraph five of the case stated and the clerical work incident to the examination and correction and revision of assessments returned by the assessors, and the preparation of transcripts or appeal notices described in paragraph eight of the case stated, are duties of the board of assessment, with which the county commissioners have now nothing whatever to do.

As to the question of whose duty it is to transcribe the duplicates from the assessment blotters, called in the case stated shelf-books, there is more room for difference of opinion. If the board of assessment had no further duties to perform in regard to the assessment itself after the determination of all appeals, we should be inclined to think that the making of a transcript, or clean copy of the assessment which we understand the shelf-books to be, might fairly be considered to still be one of the duties of the commissioners. The act of April 15, 1834, P. L. 512, section 15, provides that immediately after the appeals are over the commissioners shall proceed to regulate the assessments according to the alterations made, and shall cause their clerks to make fair duplicates thereof. The duty of regulating the assessments according to the alterations made by the appeal plainly now belongs to the board of assessment, and that board can hardly be said to have "ascertained and revised" the valuations which are to stand as the valuations of the assessments for three years until they have made a fair transcript of their work. It would seem, therefore, to be a duty imposed upon the board of assessment to put the assessment made by them into a shape in which it may be properly inspected by the public, whether the direction to the commissioners to make a fair duplicate is contained in the act of 1834 is still binding on them or not. Besides, the board of assessment is required to revise the assessments made by them between the triennial assessments by adding new, increased or omitted subjects of taxation and the revision of valuations, and on request to send to any taxpayer a statement of his taxable property and its valuation. This would seem to require them to keep in their office a statement of the assessments in proper form for such use. The act omits to provide for any certification by the board of assessment to the commissioners of the assessments made by them. It is still the duty of the commissioners to levy the taxes as before, and for this purpose they must have the assessment and valuation of property before them. Whether they are to obtain this by resorting to the office of the board of assessment as they might resort to any public office for the inspection of public records, does not clearly appear. The act would seem to need amendment in this respect. We are not, however, here concerned with what the commissioners

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are to do or not to do but only with what the board of assessment is authorized and therefore is required to. We are of opinion, in view of the whole matter, that the board of assessment has the right to have clerks for the purpose of making fair copies for use in their own office and that these books so made are the official record of the valuations made by them.

The only remaining matter is the claim of the board of assessment for clerks for the purpose of making duplicates of the assessment to be sent to the school boards of the county. The act of May 8, 1854, P. L. 623, section 29, relating to common schools, requires the county commissioners to furnish the school boards with a correct copy of the last adjusted valuation of the matters made taxable for state and county purposes. We are clearly of opinion that this duty is not transferred to the board of assessment, but still remains in the county commissioners, and that therefore the board of assessment is not entitled to clerks for this purpose.

There is nothing in the case stated from which we could draw any conclusion as to the number of clerks required except the concessions on the part of the salary board above stated. The appeal of the board of assessment is therefore sustained in part, and it is now adjudged that the board of assessment is entitled to employ twenty-six clerks for ten months in the year, being one head clerk at a salary of $150 per month, ten transcribing clerks at a salary of $100 a month each, and fifteen transcribing clerks at a salary of $75 a month each.

For board of assessment, *W. H. McClung.*
For salary board, *A. B. Hay.*

(Common Pleas No. 2, Allegheny Co.)

RICHTER v. LAUMAN.

Taxes—Lien—Time of filing—Act of June 4, 1901.

Under the act of June 4, 1901, the entry of unpaid taxes in the prothonotary's office more than two years after the year in which the taxes become payable is a nullity and the lien of the taxes has been lost.

No. 503 October Term, 1906. Case stated.

Opinion by SHAFER, J. Filed September 19, 1906.

This is an amicable action of assumpsit for the amount of certain claims for taxes against a property conveyed by defendant to plaintiff, it being agreed that judgment should be entered for the plaintiff for those of such claims as should appear to be valid liens against the property. The liens in question are for county, poor and school taxes entered in the office of the prothonotary of Allegheny county. A number of these liens were entered more than five years ago and no *scire facias* has ever been issued upon them for their revival or collection. It has already been held by this court in the cases of *Hamill* v. *Andresak*, 34 P. L. J. 501, and the *School District of Verona* v. *McKay*, 35 P. L. J. 311, that such claims for taxes were no longer a lien upon the property against which they were assessed. The other claims are for taxes for the years 1897 and 1899, entered in the years 1902 and 1903 respectively. The act of June 4, 1901, P. L. 364, which is intended to provide a complete system of procedure upon claims for taxes and municipal liens, in section 10 expressly provides that "claims for taxes must be filed in the court of common pleas on or before the last day of the second calendar year after that in which the taxes or rates are first payable." The taxes last mentioned were not filed for long after this period. We are of opinion that the filing of a claim for such taxes after the period prescribed by the act is a mere nulity, and that the lien of these taxes has been lost. If this be correct the plaintiff is not entitled to recover anything in this action.

Judgment is therefore entered for the defendant.

For plaintiff, *S. M. Myers.*
For defendant, *Schoyer & Hunter.*

Court of Common Pleas,

FRANKLIN COUNTY.

COMMONWEALTH ex rel. v. ROWE

School law—Vaccination—School children—Dismissal—Duties of superintendent, principal, teachers and directors—Mandamus—Relator—Parties—Record—Amendment.

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The act of June 18, 1895, P. L. 203, relating to public health, is an exercise of the police power of the state. The enforcement of it is a public duty and therefore, by the very words of June 8, 1893, P. L. 346, the writ of mandamus is to be prosecuted in the name of the attorney-general.

The position of a teacher in a public school is not an office. If, however, a teacher in a public school be an officer against whom a writ of mandamus may issue, it certainly cannot issue to compel him to do any act or thing which he is not empowered to do by law. The duties of public school teachers and superintendents of schools are defined by statute. Nowhere is there any statute in Pennsylvania authorizing or empowering a teacher or superintendent to expel a pupil from the public schools. That power is lodged alone in the board of directors.

By section 24, act of May 8, 1854, P. L. 632, the directors are given the power to suspend or expel from the schools all pupils found guilty of full examination and hearing, of refractory or incorrigibly bad conduct. Where it is the duty of the pupil to be vaccinated in order to admission to the public schools, no one will be heard to say that the refusal to submit to vaccination would not be such refractory conduct as would authorize the board to expel. The most the teacher can do is to report the facts to the board. What has been said of the authority of the teacher applies as well to the superintendent.

No. 105 February Term, 1906. Petition for mandamus.

Opinion by GILLAN, P. J. Filed January 16, 1906.

The attorney-general presented his petition for a writ of alternative mandamus. He set forth, first: that the first six above-named defendants were school directors of Waynesboro School District, J. H. Reber, another of the defendants, superintendent of the schools of said district, Charles H. Coover, another defendant, principal of the Snider avenue school building, belonging to said district, the defendant, Chester A. Geesaman, teacher of the "A" grammar school conducted therein. That the defendants, Coover and Gessaman, were in charge of said "A" grammar school. Second. The school directors of said district, on July 7, 1905, adopted among others, the following rule and regulation: Title, superintendent. Paragraph 2. "He (the superintendent), shall assign pupils to proper schools and classes, fix the grades of the several schools, and shall promote all pupils who have finished the prescribed course in their respective grades and have passed the necessary examinations." Third. The passage of the act of June 18, 1905, entitled "An act to provide for the moral effectual protection of the public health," and reciting section 12 thereof. Fourth. That the defendants have neglected and refused to enforce the provisions of section 12 of said act; that one, Grace Stull, a child of school age, was, on January 2, 1906, admitted to the said "A" grammar school in the said Snider avenue school building, and is still in attendance thereon, without having first submitted a certificate, signed by a physician, setting forth that she had been successfully vaccinated or that she had previously had smallpox. Fifth. That it was the duty of the defendants to exclude said Grace Stull from said school until she had first complied with the provisions of the above-mentioned act of assembly, and that for their refusal to do so there was no adequate remedy at law, and praying for an alternative writ of mandamus. The writ was awarded returnable on January 23. On that day a motion to quash was presented. The motion to quash was overruled and the defendants directed to make return to said writ. The defendants filed a return to this writ. By this return they say: that the first six above-named defendants, at the time of the issuing of the writ, were school directors of the district, but at the time of the filing of the return the board was composed of A. H. Rowe, J. S. Strickler, H. C. Criswell, J. E. Frantz, four of the above-named defendants, and J. W. C. Jacobs and P. M. Stoler. They admit that the defendant, Reber, is superintendent. They admit that the said directors and superintendent are charged with such duties in connection with said schools as are imposed upon them by the statutes of the state. They deny that they are in charge of said schools within the meaning and intent of the provisions of section 12 of the act of June 18, 1895, above mentioned, and aver that no duties or obligations are imposed upon them or either of them, by said act. They admit that the defendant, Reber, is required to perform the duties enjoined by law on county superintendents, and to

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perform such other duties as may be lawfully required of him by the by-laws and regulations of the board. They admit that at the time of the issuing of the writ, the defendant, Coover, was principal of the Snider avenue school, and that Geesaman, was teacher of the "A" grammar school, but aver that at the time of filing the return Coover was no longer connected in any way with the schools of the district, and that Geesaman was no longer teacher of the school in which Grace Stull was a pupil, but had been elected teacher of the "B" grammar school in said building. The respondents admit the facts set forth in the second and third paragraphs of the petition. Fourth. As to the matters alleged in the fourth paragraph of the petition, the respondents admit that the said Grace Stull was admitted to the school without a certificate as required by section 12 of the act of 1895 above mentioned. That said admission was not with the approval or by the direction of the directors or the superintendent, but they admit that they had knowledge of the fact of such admission and attendance. They aver that they neglected no duty; that they have not neglected to enforce the provisions of section 12 of the act of June 18, 1895, because they say no duty was imposed upon them in the premises. Fifth. Defendants deny that it was the duty of the directors or superintendent to exclude the said Grace Stull from said school until she had complied with the provisions of the act of assembly. And that with respect to the neglect of any duties imposed by the act of assembly on the defendants, Coover and Geesaman, there is an adequate remedy at law; and further, as to said defendants, Coover and Geesaman, they are not, nor is either of them, such an officer against whom a writ of mandamus may be legally issued. That as to Stoner and Kuhn, the writ should not issue because they are not now school directors. That the writ should not issue against Coover because he he is not now connected with the schools; that his successor has not been chosen. That the writ should not be issued against Geesaman because he is no longer connected with the "A" grammar school.

To this answer the plaintiff has demurred. The questions here raised brings us again to a consideration of what is commonly known as the compulsory vaccination law. With the wisdom or foolishness of this law we have nothing whatever to do. If the law be, as many think, foolish, the remedy is with the law-making power, but not with the judicial branch of the government, whose duty it is to administer the laws as they find them. Until the law is repealed or modified it will be our duty to see that it is enforced. On the argument the first contention of the respondents was that the attorney-general is not the proper relator in the case, but that the officer at the head of the department of health is the relator, at whose instance the writ must issue, if at all. It is provided by the act of June 8, 1893, P. L. 346, that "When the writ is sought to procure the enforcement of a public duty, the proceedings shall be prosecuted in the name of the commonwealth on the relation of the attorney-general. . . . Provided, that when the proceeding is sought to enforce a particular public interest of the state, it shall be on the relation of the officer entrusted with the management of such interest." We think, in view of what was said by the Supreme Court with reference to the act of June 18, 1895, P. L. 203, *Stull* v. *Reber*, 215 Pa. St. 160, that this proceeding is not brought to enforce a particular public interest of the state. If it be said that the proceeding is to enforce a particular public interest of the state, and that particular public interest be the health of the school children of the state, the reply is in the language of Chief Justice Mitchell, in *Stull* v. *Reber*, supra, "What bearing it has on the school or school districts is altogether incident to them as constituents of the community." The act under consideration is an exercise of the police powers of the state. The enforcement of it is a public duty, and therefore, by the very words of the act of June 8, 1893, P. L. 346, the writ is to be prosecuted in the name of the attorney-general.

The next contention of the defendants is, that the writ cannot go out against Coover or Geesaman because they are neither officers nor magistrates within the meaning of the act of June 8, 1893, nor the amendment of 1903, P. L. 32. We are of the opinion

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that the writ cannot go out against Charles H. Coover, Chester A. Geesaman or J. H. Reber. Neither Charles H. Coover nor Chester A. Geesaman are officers or magistrates elected or appointed for any county, township or district. *Heisy* v. *Risser*, 3 Super. Ct. 200. If, however, a teacher in a public school be an officer against whom a writ of mandamus may issue, it certainly cannot issue to compel him to do any act or thing which he is not empowered to do by law. The duties of public school teachers and superintendents of schools are defined by statute. Nowhere is there any statute in Pennsylvania authorizing or empowering a teacher or superintendent to expel a pupil from the public schools. That power is lodged alone in the board of directors. If we direct the teacher or superintendent to expel Grace Stull and the board of directors direct him to retain her in the school, his duty under the law will be to obey the board to whom he is amenable. By section 24 of the act of May 8, 1854, P. L. 632, the directors are given the power to suspend or expel from the schools all pupils found guilty, on full examination and hearing, of refractory or incorrigibly bad conduct. Where it is the duty of the pupil to be vaccinated in order to gain admission to the public schools, no one will be heard to say that the refusal to submit to vaccination would not be such refractory conduct as would authorize the board to expel. The most the teacher can do is to report the facts to the board. In a volume entitled School Laws and Decisions of Pennsylvania, revised and arranged by the superintendent of public instruction, for the year 1905 it is said, page 73: "A teacher may suspend a pupil until the board can be called together to act upon the matter, but suspension for a definite time can only be inflicted by the board." While this may not be binding upon the courts, it is certainly in harmony with the act of assembly and common sense. There is surely nothing in the act of June 18, 1895, which gives to the teacher or superintendent any authority to expel a pupil. What has been said of the authority of a teacher applies as well to the superintendent. There is nothing in the rules and regulations adopted by the Waynesboro school board giving to the superintendent any authority to regulate the admission to or expulsion of pupils from the schools. The board of directors are required to exercise a general supervision of the schools. The whole scheme of legislation with reference to the common schools of the state has been to give the directors control. It certainly would not be wise to establish any divided authority. It will be seen therefore that the writ cannot go out against either of the defendants, Coover, Geesaman or Reber, and this without regard to the fact that neither Coover nor Geesaman are any longer in control. We cannot, however, agree with the counsel for the respondents in their contention that the act of June 18, 1895, P. L. 203, imposes no duties on the directors. Section 11 of the act refers to public, private, parochial and Sunday or other schools, and section 12 provides that "All persons in charge of schools, as aforesaid, are hereby required to refuse admission of any child to the schools under their charge or supervision, except upon a certificate signed by a physician, setting forth that such child has been successfully vaccinated or that it has previously had smallpox." There are, of course, many schools directly under the control and charge of the principal. The other persons in charge of the schools are the school directors, who are the supreme authority (of course within the statutory limits) in control of the public schools.

Counsel contend that the writ should not issue against the directors because the petition fails to state that a demand had been made and refusal. Where the duty is required to be performed by the law and is of a public nature, the law is of a sufficient demand and the omission to perform a refusal. *Com.* v. *Allegheny County*, 37 Pa. St. 237.

It is contended further that the writ will not lie against the defendants, Stoner and Kuhn, they no longer being directors of the school board. This position is well taken. It is provided, however, by section 25 of the act of June 8, 1893, P. L. 345: "The death, resignation or removal from office by lapse of time or otherwise of any defendant, shall not have the effect of abating the suit, but his successor may be made a party thereto, and any peremptory writ shall be directed against him."

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It appearing from the return that the places of Stoner and Kuhn have been taken by W. J. C. Jacobs and F. M. Stoler, the writ will go out against them. It is further contended that if the writ will not lie against all the parties named it will not lie against any of them. We have, however, the power to amend, and an amendment will always be allowed when a refusal to amend will defeat the ends of justice.

It is therefore ordered that the record be amended by striking therefrom the names of J. H. Reber, Charles H. Coover and Chester A. Geesaman, and that it be further amended by substituting as defendants, in the place and stead of J. H. Stoner and G. H. Kuhn, W. J. C. Jacobs and F. M. Stoler, so that the record will stand, Commonwealth of Pennsylvania, ex relatione, Hampton L. Carson, Attorney-General, v. A. H. Rowe, J. S. Strickler, H. C. Criswell, J. E. Frantz, W. J. C. Jacobs and F. M. Stoler, School Directors of Waynesboro District.

And now, October 5, 1906, this cause having come on for hearing was fully argued by counsel. Thereupon the court, after due and mature consideration thereon had (for that it appears that the said return by the defendants made to the the alternative writ is altogether insufficient), do order, adjudge and decree that judgment be entered upon the demurrer in favor of the commonwealth, and against the defendants, A. H. Rowe, J. S. Strickler, H. C. Criswell, J. E. Frantz, W. J. C. Jacobs and F. M. Stoler, school directors of Waynesboro school district; and that a peremptory mandamus issue in accordance with the provisions of section 22 of the act of assembly of this commonwealth, entitled an act relating to mandamus, approved June 8, A. D. 1893, commanding the said defendants, and their successors in office, forthwith to dismisss and exclude Grace Stull, in said writ of alternative mandamus named, from the "A" grammar school, conducted in Snider avenue school building, one of the schools of the Waynesboro school district, as enjoined and required by section 12 of the act of assembly, approved June 18, 1895, P. L. 203, until she shall have complied with the provisions of the same. Said writ to be returnable on the first Monday of November, A. D. 1906, and it is further ordered that the costs of this suit be paid by Waynesboro school district.

For relator, *Hampton L. Carson, Frank M. Eastman* and *Walter & Gilan.*

For defendants, *O. C. Bowers, Walter K. Suarpe* and *Irvin C. Elder.*

[From Irvin Cameron Elder, Chambersburg, Pa.]

CARRIERS—INJURIES—PROXIMATE CAUSE. An interesting decision on proximate cause is rendered by the Supreme Court of Colorado in Snyder v. Colorado Springs & Cripple Creek District Ry. Co., 85 Pacific Reporter 686. A passenger on a crowded car was standing on the platform with other passengers, some of whom were on the steps below. The conductor, in pushing his way through the crowd of passengers, pressed the plaintiff against one who became angry, and pushed the plaintiff with such force that he was thrown from the car, passing over the heads of passengers standing on the lower steps. The court says that the proximate cause of the accident was the action of the passenger who pushed the plaintiff, and cites its previous definition of proximate cause as that which in natural and continued sequence, unbroken by any efficient intervening cause, produced the result complained of, and without which the result could not have occurred. Under this doctrine the company was held not to be liable.

A buyer's right to retain goods and defeat action for the price because the goods do not comply with the contract is denied in America Theater Co. v. Siegel, C. & Co. (Ill.) 4 L. R. A. (N. S.) 1167..

A statute authorizing administration on an absentee's property without his knowledge or consent, and without notice to him, is held, in Grandy v. Kennedy (Va.) 4 L. R. A. (N. S.) 944, to be unconstitutional.

If one buys property of another and agrees to resell it to such other at an advanced price payable in the future, it is held, in Rogers v. Blouenstein (Ga.) 3 L. R. A. (N. S.) 213, that such a transaction, actually made, is not illegal, but will be enforced.

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PITTSBURGH, PA., JANUARY 16, 1907.

Orphans' Court,

ALLEGHENY COUNTY.

In re Estate of JOHN FLEMING, Deceased.

Co-executors—Ancillary letters—Waste of assets. Acting executor—Liability.

Where an acting executor takes out ancillary letters his co-executors are not liable for his devastavit of foreign assets in the absence of reasonable apprehension of peril.

No. 116 September Term, 1904.

HAWKINS, P. J.

STATEMENT.

The question discussed on the hearing of the exceptions to the adjudication of audit may be classified under two heads—those relating to the joint or several liability of the executor arising out of the administration of decedent's assets located,

(1) In this state; and those located

(2) In Louisiana.

In respect of the first joint letters were taken out, but Cochran Fleming became the acting executor in practical exclusion of his co-executors, Messrs. Byers and Porter, and no question of his entire solvency arose for nearly twenty years; and in respect of the second, letters were taken out in Louisiana by Mr. Fleming alone. No accounts were filed either here or in Louisiana until under order of court, the present, whereby the executors sever. Mr. Cochran Fleming charges himself with,

(a) The estate left in this county; and

(b) Certain Louisiana assets;

and his co-executors in their several accounts deny liability in fact and in law.

The questions raised are,

(1) Whether the responsibility of these executors is joint or several; and

(2) What amount should be charged against, and what credits given, the responsible party?

The auditing judge charges Mr. Fleming with

Assets in this state...	$107,192.77
Louisiana	79,813.29
	$187,006.06

And credits him with

Debts	$43,406.81	
Legacies preferred (Mrs Fleming)	55,000.00	
Specific devise (Wood St. house)	20,000.00	
Unadministered assets.	6,281.25	124,688.06
		$ 62,318.00

But Mr. Fleming swore that no part of the Louisiana assets were in point of fact received; and this with other evidence shows that the local assets were in fact exhausted by preferred allowances, as shown below:

Total charges	$187.006.06
From which deduct Louisiana assets...	79,813.29
Local assets left	$107,192.77
From which deduct preferred credits as above	124,688.06
Amount paid by Mr. Fleming in excess of local assets inventoried	$ 17,495.29

Notwithstanding accountant has voluntarily brought into his account part of the Louisiana assets, it is claimed that the charge made against him should be stricken out. The facts are these: John Fleming owned property in the state of Louisana valued at,

Personal estate.....$39,000.00
Real estate..... 40,000.00

which was in charge of the brother, James L. Fleming, to whom a life estate in $20,000 was bequeathed, and these exceptants in remainder.

Just before John Fleming's death he expressed a wish to make some change in his will, but was unable to do so. Cochran Fleming said that he "tried to figure out what change" his brother John wanted to make in his will and "made up his mind that he wanted to give" his brother James the Louisiana buisiness or a portion of it; and the key to his subsequent conduct seems to have been a desire to carry out this sup-

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posed intent. When asked why he did not get the property back from James he answered "I was'nt hunting it; I had made up my mind that I could afford to give him that whole business, let him take it; he had it, let him keep it." Shortly after John's death, Cochran Fleming on going to Louisiana to look after this property, found that his brother had disposed of everything except a few McLean's medicines. He thereupon took out letters and filed an inventory showing $79,813.29 from an invoice and balance sheet taken before his brother John's death. On the advice of a firm of young lawyers whom John had recommended he took out a policy of insurance on his brother James' life for $20,000 to secure the "reversion" of his legacy "as the best thing" that could be done. Two years afterward (1872) Mr. Fleming again went to Louisiana and finding that his brother was not paying the premiums on the insurance sought other means of protection. He found that James, who had an attack of delerium tremens, was interested with a Dr. Patterson in business and fixed up an arrangement "by which James would sell out his interest in that business to Dr. Patterson, and Dr. Patterson would sell to James his interest in certain Louisiana lands. "I got that arranged," testified Mr. Fleming. "Dr. Patterson was to pay the difference for the interest, in money or its equivalent, which amounted to some $16,000 or $17,000. I got that transfer made and all straightened up; and then I cancelled the life insurance policy and took a mortgage on the properties that James P. Fleming then held; . . . . . but at the time I took that mortgage they could'nt have sold the whole business for $5,000; but I just made up my mind that if James lived to be fifty or sixty or seventy years old, the real estate in Louisiana would enhance in value to more than cover the security and I would be all right. I took that chance; there was nothing else to do; and I took that chance on the advice of my lawyers, Hudson & Hern. I gave him $16,000, or whatever it was, with the understanding that he would go up into this land that I had secured for him and build a sawmill for the cypress timber and build up a business. He had ample money, lots of money, much more than was needed for the purpose of building up a business and taking care of this land. Then I got him started—started him as I supposed, for the cypress timber land—and he was going to build this mill. Instead of going up to the cypress timber land, he never stopped until he got to San Antonio, Texas, ... and he never moved out of San Antonio until he had spent every cent of his money." The properties mortgaged were a house and lot in New Orleans and six thousand acres of cypress timber land. James, having failed to pay the taxes, the New Orleans property was sold, and was redeemed by Cochran Fleming who paid the taxes for a while, then ceased, and the whole property was again sold. In the meantime James P. Fleming conveyed his title to Cochran. No effort has been made to redeem it, assuming that possible.

In addition to the various items charged against Cochran Fleming by the auditing judge it is claimed that the executors should be charged with profits arising out of the drug business under the following clause of the will:

"To my brother Cochran I give and bequeath the good will and proprietorship of McLanes and other medicines which I own and control, on the following conditions, to-wit: That immediately on my death he take charge of and carry on my said business, and if it is found on examination of my affairs that my available assets (in which are not to be included the warehouse and articles of a personal character hereinbefore bequeathed to my wife) are not sufficient to provide means wherewith to pay the foregoing pecuniary legacies, in the order in which are enumerated in this my last will, then he carry on said business for the benefit of my estate, until enough of moneys are realized by said business to make good any deficiency in the moneys applicable to the payment of said legacies. On the payment of said legacies my other executors will execute and deliver unto my said brother Cochran all bills of sale or conveyance of my said business and property connected therewith which may be desired by the said Cochran. All the rest and residue of my estate, after the payment of the foregoing legacies and excepting the foregoing specific devises and bequests, I give unto my said brother Cochran absolutely."

Mr. Fleming accepted the bequest and continued the business making profits from

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$20,000 to $65,000 per year until his failure in 1890.

On the other hand the accountant insists that the charge against him of $—— for merchandise, etc., should be stricken out because that property was specifically given him in the above recited clause.

OPINION. Filed March 25, 1905.

It must of course be conceded that the responsibility of an executor is *prima facie* limited to the state in which his letters are granted. Thus it was held in *Musselman's Appeal*, 101 Pa. 165, that letters testamentary to a Pennsylvania citizen upon the estate of a non-resident gave no jurisdiction to our courts over the accounts; and so in *Lines* v. *Lines*, 142 Id. 149, it was held that a court of equity in this state had no jurisdiction over the personal assets of a foreign decedent which would authorize the taking of such assets out of the hands of those in possession; and presumptively the power of an executor does not extend beyond that of the court whose officer he is. Whenever, however, the interposition of an executor is needed for the preservation of such assets—as for example the taking out of ancillary letters—it may become his duty to take appropriate action; but the burthen is on those who allege the need to show it; and it was accordingly held in *Mothland* v. *Wireman*, 3 P. & W. 185, and endorsed in *Shinn's Estate*, 166 Pa. 121, that a "Pennsylvania administrator was not liable for the funds received by his co-administrator, a resident of Maryland, on assets located in Maryland." That case is stronger than the present because by the terms of the administrators' official bond they were jointly liable, while here it is the recognized right of the executors to sever even in the administration of domicillary assets. In point of fact Mr. Fleming did sever and assume the sole responsibility for the administration of the foreign assets of the estate; and there was nothing in the circumstances to put any man of ordinary prudence on notice that the estate was endangered. It follows that neither of his co-executors was liable for that fund. But it is equally clear that Mr. Fleming was liable for the whole amount of the inventoried assets. There is no question raised as to the amount of James P. Fleming's peculation and therefore, the extent of his liability. It is absurd to say that this accountant could not have collected this amount. He found on his second trip what he might have discoved by the exercise of a little diligence on his first, that his brother still had the money which he had stolen. He not only took no legal steps to collect, but admits that he had made up his mind to let his brother James keep it and was actually instrumental in turning over to him an amount of cash which no doubt represented part of John Fleming's estate, and if properly invested would now be sufficient alone to make up the deficit. The loss being the direct result of his wilful misconduct his liability follows as a matter of course. This is too plain to need the citation of authorities. There is plausibility in the theory that the merchandise with which accountant has been charged is not primarily liable for the payment of debts and legacies. The direction to carry on the business of Fleming Bros. implied that it should be carried on in the ordinary way and with the ordinary means; and the use of the stock on hand seems a necessary means: *Furst* v. *Armstrong*, 202 Pa. 308; *Oliver* v. *Lansing*, 59 Neb. 219; *Manufacturing Company* v. *Improvement Company*, 30 Fed. Rep. 865. But conceding that he is not primarily liable for these, the profits of the business, which proved far in excess of the merchandise and Louisiana assets taken together and ample to pay all charges, were so. By the terms of the will Cochran Fleming "immediately" on testator's death was due to take charge of and carry on his business; and if on examination of his affairs his "available assets" were "not sufficient to provide means wherewith to pay" the legacies, "then," that Cochran "carry on said business for the benefit" of the "estate until enough of money is realized by said business to make good any deficiency in the moneys applicable to the payment of said legacies." The profits of the business were thus plainly made the source of payment of any deficiency of assets; and even if the two items of merchandise and Louisiana assets were stricken out the accountant would be in no better position than he is now; he would be liable in any event. On the other hand it is equally

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plain that his co-executors have no concern in this branch of the administration. The gift is to Cochran Fleming; "immediately" on testator's death "*he*" is to carry on the business; and in case of deficiency then "*he*" is to carry it on for the purpose of supplying the deficiency. The duty of making up the deficiency was plainly imposed on him exclusively, This was *his* special trust. When therefore the domicillary assets which had been set aside as the primary fund for the payment of debts had, as the proof shows, been exhausted on that account, the ordinary duties of his co-executor ended, and his special functions began.

This view renders unnecessary any discussion of the question of the joint or several liability of the deceased executors as respects local assets. These assets, for whose administration their letters imported liability, have reached their legal destination and no loss has been occasioned by any act of theirs. And there is no moral obligation resting on their estetes to stand for the claim made here. Cochran Fleming assumed the burthen of administration as he had a legal right to do; he was then and for nearly a generation continued to be, responsible; and his co-executors had no reason to suspect him of abusing his trust.

The adjudication of audit does substantial justice and the exceptions must therefore be dismissed.

For petitioners, *Over & Adair.*
For Cochran Fleming, *J. M. Swearingen.*
For Byers estate, *Watson & Freeman.*

Court of Common Pleas No. 2,

ALLEGHENY COUNTY.

COMMONWEALTH ex rel. STEWART v. PRICE et al.

Elections — Borough auditor—Primaries—Act of February 17, 1906—County Commissioners—Mandamus.

Where a regularly organized political party in a borough has nominated candidates for borough offices, including that of borough auditor, and has notified the county commissioners of such nomination, a writ of alternative mandamus directed to the county commissioners requiring them to receive the petition of a qualified voter of the borough and have his name printed as a candidate for borough auditor on the official ballots of the party to be furnished by the commissioners to the regular election officers of the borough to be voted on at the winter primaries of the borough and also requiring the election officers of the borough to hold a winter primary in accordance with the Uniform Primary Act of 1906, will be refused.

No duty rested upon the county commissioners in this case because of the provision of section 2 of the Primary Act, which provides that "nothing herein contained shall prevent the nomination of candidates for borough or township offices or other offices not herein specifically enumerated in the manner provided by existing law."

No. 1070 January Term, 1907. Mandamus.

Opinion by SHAFER, J. Filed December 31, 1906.

A writ of alternative mandamus was issued herein requiring the defendants as county commissioners to receive the petition of one, James W. Johnston, a qualified voter of the borough of Springdale in said county, to have his name printed on the official ballots of the Republican party, to be furnished by the county commissioners to the regular election officers, to be used and voted on at the winter primaries of the borough of Springdale, as a candidate of the Republican party for the office of auditor of said borough, and to cause the regular election officers of that borough to hold a winter primary on January 26, 1907, so as to carry into effect the Uniform Primary Act of 1906, or to show cause why they should not do so.

To this writ the county commissioners have made a return, called by them an answer, in which they set out that the Republican party in the borough of Springdale is a regularly organized political party, that that party has elected to nominate the candidates for borough offices, including the office of borough auditor, in the manner provided by law at and before the time when the Uniform Primaries Act was passed; that the proper officers of said Republican party in said borough had duly notified the defendants of such election, and that, therefore, as they are advised, it is not the duty of the defendants to do that which the alternative writ directs. To this return the relator has demurred.

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The question in this case arises upon the meaning and effect of the proviso contained in the second section of the Uniform Primaries Act of February 17, 1906. That section provides for two primaries, one to be known as the winter primary and one as the spring primary, to be held in a manner therein directed, and provides that candidates for all offices to be filled at the February election shall be nominated at the winter primary, and further provides that no candidates for the public offices named shall be nominated in any other manner, "provided that nothing herein contained shall prevent the nomination of candidates for borough and township offices or other offices not herein specifically enumerated in the manner provided by existing laws." It also provides that the act shall not apply to the nomination of presidential electors or for candidates to be voted for at special elections.

We do not well understand on what ground the relators in this case desire to stand. They argue that the act as a whole is unconstitutional. If they are right in that, it follows of course that they cannot have the relief asked for. They argue that the proviso in question makes the act unconstitutional by making it special legislation, and that therefore the court would be justified in striking out the proviso so as to save the rest of the act. This, we submit, is an unheard of claim. If the legislature uses words which would make an act general and adds a proviso which would make it special, the court would have as much right to amend the act by striking out the general words as it would have to strike out the proviso itself. There is no analogy between such case and a case where a part of the act as in itself unconstitutional and may be held void without affecting the rest of the act; but, as in this case the legislature has distinctly declared that this act shall not prevent the nomination of borough and township officers as they were heretofore nominated, that declaration of the legislature must stand, whatever may be its effect on the act itself. No question of the constitutionality of the act, therefore, properly arises in this case. It does not seem to us, however, that the provision that borough and township officers may be nominated otherwise than at the primary provided by the act, makes the act in any way special or local. There are many reasons why borough and township officers might well be nominated in a different manner from the officers in cities and counties. The act does not except borough and township officers wholly from its operation, but seems to indicate that such officers may be nominated either under this act or in the manner provided by law before the passage of the act, without stating by whom the mode to be pursued is to be determined. As the mode of making the nominations at the time of the passage of the act was determined by the rules of the parties in question, it must be understood, when the act says nothing therein contained shall "prevent" a nomination as heretofore, that that choice under party rules is still to be continued. That some regulation as to when, how and by whom that election should be made and certified to the commissioners and its validity ascertained in case of dispute, would form a valuable, not to say necessary, improvement of the system provided by the act, would seem to be undoubted, but that is a matter with which we have no concern.

The demurrer is therefore overruled and judgment is entered for the defendants with costs.

For relator, *H. M. Scott.*

For respondents, *George E. Alter.*

Court of Common Pleas,

VENANGO COUNTY.

GRANT v. COMMONWEALTH.

Justice of the peace—Summary conviction—Trial without the presence of defendant.

A summary conviction before a justice of the peace in the absence of the defendant will be sustained on exceptions where it appears that the absence of defendant was voluntary, and that the penalty imposed was a money penalty only.

In such a case the conviction will be set aside, however, where it appears that the justice of the peace did not incorporate in his return as a part of the record, the whole testimony, or the substance thereof. The fact that he subsequently returned the substance of the testimony is imma-

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terial, as such return does not make it a part of the record,

No. 24 August Term, 1906. Certiorari to summary conviction.

Opinion by CRISWELL, P. J. Filed October, 1906.

Three exceptions have been filed to the record in this case, which is an action to enforce and recover a penalty for a malicious trespass under the act of June 8, 1881, P. L. 82, as amended by the act of June 18, 1895, P. L. 196.

The first exception is that, "The justice erred in hearing the case and passing sentence upon the defendant in her absence, as shown by the record" and certain constitutional guarantees relating to trial by jury, etc. are referred to as sustaining the exceptions. Such guarantees do not apply, however, in all their scope and detail to all prosecutions popularly known as criminal. There is a class, or numerous classes of petty or minor offenses, not usually embraced in public criminal statutes, and not of the class or grade triable at common law by a jury to which they are not so applicable. *Callan* v. *Wilson*, 127 U. S. 540. These are recognized in the Constitution of the state as well known, provision being made for an appeal, upon cause shown, in cases of summary conviction or of judgement in a suit for a penalty. In other cases summary conviction is provided for by statute with the right of an appeal and a trial by jury. These have been held not to be a denial of trial by jury, but on the contrary only "a casting up of a highway" over which in the judgment of the people as expressed in their fundamental law, suitors should go in order to reach a trial by jury. *Com* v. *McCann & Co.*, 174 Pa. 19-23. Such a law is the one under which this action was brought. It provides for a conviction summarily before a justice or alderman with the right of an appeal to the court of quarter sessions and a trial by a jury therein. The defendant below has in no way been deprived of such right. She has not had it simply because she has not demanded it. Whether or not she may yet demand it we are not now required to determine.

As to the presence of a defendant at the time of trial and sentence in a criminal prosecution, the rule appears to be that in all capital felonies the presence of the defendant is not only necessary, but the fact of such presence must appear by the record. In other cases, not capital, but punishable corporally by imprisonment, or otherwise than by fine, the defendant should be present, and such presence will ordinarily be assumed when the record does not show otherwise, but where a defendant, so charged, being under recognizance, voluntarily absents himself during the progress of the trial he cannot complain of the fact that the trial has been concluded and a verdict rendered in his absence. *Lynch* v. *Com.* 88 Pa. 189. This is true in action punishable summarily by the imposition of a penalty, before a justice or alderman. *Com.* v. *McAndrews*, 3 Lack. L. N. 339; *Denzin* v. *Com.*, 3 Pa. C. C. R. 654; *Com.* v. *Evans*, 29 L. I. 133. Such appears to be the rule in England. 4 Black Com., 1 T. R. 320.

In the proceeding under review, the record shows that the defendant was brought before the justice when a time was fixed for a hearing. At the date so fixed she appeared and asked for a continuance, which was granted. On the date then fixed for the trial she appeared, but a further continuance was granted on the application of the prosecutor, but on the date then fixed for the trial, she did not appear, and was not represented, and the trial proceeded in her absence. She had due notice of the time fixed for the trial and it is not apparent that she has any reasonable grounds for complaint because of the fact that she was not placed under recognizance to appear at this time.

In view of these facts and the practice and the authorities above referred to, we are of the opinion that the plaintiff in error, should not complain of the fact that the trial proceeded in her voluntary absence. By the terms of the statute under which she was arrested the offense with which she was charged was punishable only by the imposition of a penalty. The only judgment which could thereunder be properly rendered against her was that she pay a penalty not exceeding fifty dollars and costs. After due notice, she voluntarily absented herself for the hearing. The fact that under the statute, payment of the penalty might be enforced by

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imprisonment, is not material. See cases cited supra and *Lon* v *People*, 12 Wend. N. Y. 344. The act makes the imprisonment a consequence of nonpayment and not a part of the judgment. *Com.* v. *Borden*, 61 Pa. 272. From these considerations we conclude that the first exception must be dismissed.

The second exception, which is that the justice fails to make any disposition of the penalty, must likewise be dismissed. The statute provides for a disposition of the penalty. *Com.* v. *Borden*, supra.

The third and only remaining exception, is that the record fails to set forth any of the testimony. There appears to be no question but that the proceeding is one which properly belongs to the class known as summary convictions. They have been defined or described as "A mode of punishment for a public crime or offense, which must always be commenced in the name of the commonwealth, and is founded upon information or complaint which should generally be in writing. It is the record of a magistrate's proceedings upon a penal statute, for the violation of which a defendant has been convicted and sentenced," *City* v. *Duncan*, 4 Phila. 145. They are always founded upon a statute, in the construction of which the rules applicable to penal statutes are applied. In many cases no appeal is provided for, and because of this fact and to prevent abuses which might otherwise result from arbitrary conduct on the part of magistrates, it has been uniformly held the records of such convictions must show all facts essential to a conviction, including the substance of the proofs upon which the conviction was based. Such is the rule in this commonwealth, *Com.* v. *Borden*, supra.

It is argued, however, that the defendant in such cases has under the statute the right of appeal to the court of quarter sessions, and is thus protected against arbitrary and unlawful conduct on the part of magistrates, and therefore that the rules applicable to summary convictions where no right of appeal exists should be relaxed or do not apply. This contention omits consideration of the fact that a defendant, even if guilty, has a right to demand that he be lawfully convicted before a magistrate, without incurring the expense and delay of a trial in the quarter sessions, since such proceedings are "designed professedly for the greater ease of the subject by doing him speedy justice," as well as to save the trouble and expense of more formal trial, 4 Black Com., 280. In the absence, therefore, of any authority to the effect that where a party charged with an offense which may be punished summarily has a right to an appeal, it is unnecessary for the magistrate to follow the rule relative to the incorporation in the record of the substance of the whole testimony, as indicated in *Com.* v. *Borden*, supra, we must hold that such rule still prevails and is applicable in such cases as in others, where no right of appeal is granted.

The fact that the justice afterward returned separately what he certifies is the substance of the evidence given by the witnesses at the hearing is not material. By so returning, it did not become a part of the record, and cannot be considered as such in this proceeding. *Com.* v. *Gipner*, 118 Pa. 379.

For the reasons given the third exception to the record must be sustained.

And now, October 1906, the first and second exceptions to the record are dismissed, the third exception is sustained and the judgment of the justice is reversed.

[From F. A. Sayers, Esq., Franklin, Pa.]

Professional Fees in England.

When a young man determines to become a barrister and enters his name at one of the inns of court in London or Dublin he has to pay to the government a fee of £25. And when he is a full-fledged English or Irish barrister or a Scotch advocate he has to fork out a further sum of £50.

Should he desire to become a solicitor he is fined even more heavily. When he becomes an apprentice his fee to the government is £80, and his yearly duty when he begins practice is, for the first three years, £3 in the country and £4 10s. in London or Dublin, and after the third year £6 and £9 respectively. So that a solicitor practicing forty years in London will have paid the government over £400.

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A law agent (Scotland) pays £60 at commencement of study and £55 or £85 on beginning practice in the sheriff's court or court of session.

If you want to change your surname of your own free will the government charges you only £10, but if you do it under the direction of some deceased benefactor it costs you £50.

Bishops pay £30 for permission to be elected and £30 more for the royal assent to their election, and the fees paid on receiving letters patent are: By a baronet, £100; a baron, £150; a viscount, £200; an earl £250; a marquis, £300, and a duke, £350. —*London Express.*

CARRIERS. (STREET CARS—WRONG TRANSFER TICKET—EJECTION OF PASSENGER.) OHIO SUP. CT.

Where a passenger on a street railroad who has paid his fare and is entitled to ride over another line beloning to the same company asks for a transfer ticket over such other line and by mistake of the conductor is given a transfer which is not good over such other line, he may nevertheless if he has exercised such care about the receiving and making use of the transfer ticket as persons of ordinary prudence are accustomed to exercise under the same or similar circumstances, lawfully insist in being carried over such other line without further payment of fare, and if such passenger with fault on his part is ejected from the car for refusing to pay fare other than by such transfer ticket, he may recover damages for the tort and cannot be restricted to damages for breach of the contract to carry him. Cleveland City Ry. Co. v. Conner, 78 N. E. 376. It was argued that because the conducter who refused to receive the tranafer was acting according to instructions and within the line of his duty as between himself and his employer that plaintiff had no cause of action against the employer for being put off the car. To this the court replies that the action is not a controversy between the master and the servant nor between the passenger and the conductor, nor yet between the carrier and passenger solely in regard to the act of the carrier's servant in ejecting the passenger from the car, but was founded upon the wrongful and negligent act of the servant giving the transfer which was the proximate cause of the resulting injury.—*The Green Bag.*

Compelling a corporation to transfer stock on its books into the name of the purchaser is held, in Westminister Nat. Bank v. New England Electrical Works (N. H.) 3 L. R. A. (N.S.) 551, not to be such an interference with its internal affairs that a court of a state other than that of its creation will not decree it.

It has been held, In re Knopf, 16 Am. B. R. 432, that the sale of the entire stock of a merchant within four months of his adjudication as a bankrupt made without an inventory having been taken is null and void under section 67e of the Bankruptcy Act as a sale made with intent to hinder, delay and defraud creditors, and the title to the goods vests in the bankrupt's trustee, unless the purchaser shows not only that he acted in good faith and paid a present fair consideration, but that he exercised ordinary prudence and diligence to ascertain whether the seller who at the time of the sale was insolvent could make transfer of his property violative of the Bankrupt Act.

EXAMINATION OF NONRESIDENT CORPORATE OFFICERS. The provision of the Missouri statutes that when the attorney general, in proceedings against a corporation under the anti-trust law, files a statement giving the names of the nonresident officers of the corporation, whose testimony he desires, the court shall issue a notice to the attorney of record for the corporation notifying him that the testimony of the persons named is desired, and requiring him to have them present at the time and place fixed for their examination, is upheld in State v. Standard Oil Co. of Indiana, 91 Southwestern Reporter, 1062, and it is also maintained that foreign corporations are to be regarded as being bound by the provisions of the statute on the principle that, by coming into the state to do business pursuant to the terms prescribed by the legislature, a contract requiring them to conform to the existing laws is to be implied.

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PITTSBURGH, PA., JANUARY 23, 1907.

Court of Common Pleas No. 2,

ALLEGHENY COUNTY.

PITTSBURGH COAL CO. v. ALLEGHENY NATIONAL BANK et al.

Real estate—Covenant running with the land—Jurisdiction -- Suit brought in another county.

B sold to C certain coal lands which were subject to the burden of maintaining the surface and gave an agreement under seal to indemnify C from any liability for damage to the surface by reason of careful and skillful mining. C sold the coal to A. The surface owner recovered a verdict against A for damages, of which suit B had notice but refused to defend.

In a suit by A against B to recover the amount of the verdict and expenses, it was held that the agreement against liability for surface damages was a covenant running with the land.

As service could not be obtained against B in the county where the land was situated suit was properly brought in the county of B's domicile.

After a general appearance and demurrer on other grounds it was too late for B to take advantage of the defense that the suit should have been brought in the county where the land lay.

No. 334 October Term, 1906. Sur demurrer to statement.

Opinion by SHAFER, J. Filed October 20, 1906.

The statement sets out that the defendants were the owners of coal lands in Westmoreland county, Pennsylvania, which lands have never been released from the burden of maintaining the surface over the coal; that the Youghiogheny Coal Company purchased these coal lands from the defendants, taking from them a conveyance thereof and an agreement under the seal to indemnify the Youghiogheny Coal Company from any liability "for any damage which may result to the surface of the tracts of land overlying the aforesaid blocks of coal or others or to improvements thereon by reason of the careful and skillful mining and taking away of said coal;" that afterwards, in 1889, the Youghiogheny Coal Company agreed in writing to sell and convey to one, Upson A. Andrews, and others, their nominees and assigns, all their interests in said coal lands, together with the appurtenances, and that this agreement was with the consent of the Youghiogheny Coal Company assigned by Andrews et al. to the Pennsylvania Mining Company. That the Pittsburgh Coal Company, the plaintiff herein, as the nominee, lessee and agent of the Pennsylvania Mining Company, proceeded to mine the coal in question in a careful and skillful manner, which mining and removal caused a subsidence of the surface; that one, Richard Greenawalt, the owner of the surface, brought suit against the Pittsburgh Coal Company in the common pleas of Westmoreland county in the year 1901, of which suit the defendants in this section had full notice; that the defendants in this action refused to defend the same, but that the same was defended by the Pittsburgh Coal Company, and that the action was so proceeded in that a verdict was given and judgment rendered thereon for the plaintiff, Greenawalt, against the Pittsburgh Coal Company for $1,664.61, and that the Pittsburgh Coal Company necessarily laid out and expended in and about the defense of the action a sum which together with the verdict amounts to $2,472.09; that after the mining of said coal, on November 10, 1903, the Youghiogheny Coal Company made a formal conveyance of the coal lands in question to the Pennsylvania Mining Company and at the same time assigned to the Pennsylvania Mining Company all its rights in the agreement of indemnity above mentioned.

The suit in this case was brought on August 2, 1906. On August 13, 1906, a general appearance was entered for the defendants. On September 5, 1906, a demurrer was filed to the statement above mentioned, the reasons assigned being that the covenant sued on does not run with the land, is not assignable and was personal to the Youghiogheny Coal Company. Afterwards, on September

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11, 1906, the defendants had leave to assign an additional ground of demurrer, namely, that if the covenant did run with the land, then the action was local and could not be maintained except in the county of Westmoreland where the land lies. Whether a covenant runs with the land or not depends largely on the circumstances. Without undertaking to determine at this time whether the covenant sued in this case does in fact run with the land, we are of opinion that so far as the statement discloses the circumstances of its being made, it appears to be a covenant running with the land, although not containing the word, "assigns," because it seems to be one which was made for the benefit of whoever should be the owner of the land at the time of the removal of the coal.

It is claimed by defendants that the action, if maintainable at all, is local and should have been brought in Westmoreland county where the land lies. It was admitted on the argument that the defendants did not live and could not be served in Westmoreland county. It is also admitted as a matter of law that if this action had been brought by the Youghiogheny Coal Company, the original covenantee, it might be brought in any county where the defendants were found. It is claimed, however, that the present plaintiffs do not stand in privity of contract with the defendants, but must found their suit upon privity of estate, and that when that is the case the action is local, and this is said to be the case whether the action is intended to enforce a burden charged upon the land or a covenant made for the benefit of the land. It must be admitted that the law is laid down substantially to this effect in the old books. The only Pennsylvania case that has been pointed out to us is that of *Henwood* v. *Cheeseman*, 3 S & R. 500, where the discussion of the matters now in question were entirely obiter, the action being assumpsit for the use and occupation of lands lying out of the state in which no such question could arise, the action of assumpsit being as is there stated always transitory. In the case of *Fennell* v. *Guffey*, 155 Pa. 38, the question was raised in a case where the owner of the land was endeavoring to charge the assignee of a lease made by him. The matter is disposed of by the court saying, "If we concede the defendant's position, it was too late to take advantage of it after plea pleaded." The courts of Pennsylvania would, therefore, seem to be in a position to discard a technicality, which at this day can serve no useful purpose whatever, but on the contrary must frequently produce a total denial of justice, at least in a case where the defendants are not in possession of the land and the plaintiff is in possession and is entitled to the benefit of a covenant made by the defendants. There can be no possible good accomplished by holding the action to be local to the county where the land lies. Whatever the law may be in the respect, however, we are of opinion that it is too late to set up the privilege of being sued in Westmoreland county, after the entry of a general appearance followed by a demurrer on other grounds.

The demurrer is therefore overruled and the defendants are allowed fifteen days after notice hereof to file an affidavit of defense.

For plaintiff, *J. O. Petty*, *Elliott Rodgers*.
For defendants, *John D. Brown*.

(Common Pleas No. 2, Allegheny Co.)

KIFER v. PUBLIC TRUST CO.

Commissions—Real estate agent—Employment.

In order to entitle a real estate agent to commissions on the merger of two corporations it must affirmatively appear that there was an employment or a subsequent ratification with full knowledge of the amount and extent of the services rendered.

No. 507 January Term, 1904. Sur motion to take off non-suit.

Opinion by FRAZER P. J. Filed April 4, 1906.

Plaintiff, a real estate agent, claimed from defendant the sum of $6,000, with interest from November 9, 1903, for commissions as a broker for services alleged to have been rendered in bringing about a merger of defendant company with the International Savings and Trust Company; defendant company being a corporation of this state with an authorized capital stock of $300,000,

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divided into 3,000 shares of the par value of $100 each, and the International Savings and Trust Company being also a corporation of this state with an authorized capital stock of $250,000, divided into 10,000 shares of the par value of $25 each. Plaintiff's contention was that he had been employed by Thomas J. Ford, Esq., a director of the defendant company, to find a purchaser for the capital stock, property and assets of defendant company; that in accordance with his employment he introduced and brought together Mr. Ford as representing defendant company and Mr. Dye, representing the International Savings and Trust Company, and that as a result of his labors a merger of the two companies followed. His claim as commission is two per cent upon the full capital stock of defendant company.

At the trial the testimony showed that plaintiff and Ford had some conversation in regard to a merger of the companies named and that he also introduced to Ford the secretary and treasurer of the International Savings and Trust Company. It also appeared that subsequently these two companies merged into one, but it does not appear from the testimony that Ford was authorized by defendant company to employ plaintiff as a broker, nor does it appear that he was actually employed as such by Mr. Ford; further than that he talked to Ford about merging the Public Trust Company with another company and said the charges for his services in case of a merger would be two per cent on the capital stock of the company. While plaintiff does not contend that there was an employment by the directors of the company, his contention is that his employment by Mr. Ford was ratified by the directors of the company before the merger, and that, therefore, the company is liable. The testimony upon that point is that while the stockholders were in session considering a merger, plaintiff appeared at the meeting and claimed a commission; that the claim was not recognized by those present, nor was any agreement made by the directors or the stockholders to pay him for any service that he might have rendered; plaintiff's appearance at the meeting being the first intimation the directors had of his claim for services, or that he had rendered any service for the company in the matter.

Before a corporation can be made liable for services of this description, it must affirmatively appear that there was an employment or a subsequent ratification, with full knowledge of the amount and extent of the services rendered. As this does not appear in this case, the plaintiff is not entitled to recover.

The motion to take off the non-suit is refused.

For plaintiff, *John B. Chapman.*

For defendant, *White, Childs & Scott.*

(Common Pleas No. 2, Allegheny Co.)

STEWART v. BRODERICK.

Mandamus—Practice—Demurrer—Act of June 8, 1893.

It is not the proper practice in mandamus to obtain an order that the writ issue in the alternative form. By the act of June 8, 1893, the granting of a rule to show cause why the writ should not issue was abolished, and it is directed that upon presentation of the petition, if it presents the substance of a cause for mandamus, the court shall direct that the writ issue in the alternative form. Where such an order is made it will be revoked and the petitioners allowed to present their petition in accordance with the act.

No. 109 October Term, 1906.

Opinion by SHAFER, J. Filed October 8, 1906.

This case was argued upon what was called a demurrer to a petition for mandamus. The state of the record actually is that a petition was presented by a number of citizens and taxpayers of the O'Hara Sub-School District of the Twelfth ward, Pittsburgh, for a writ of mandamus to be directed to the school directors of that sub-district, commanding them, first, that one of them be removed from office and a new director appointed in his place; that another of them be removed from the office of secretary and that the board be directed to have their accounts audited, to keep minutes and to account for moneys wrongfully collected for a school picnic, and that the treasurer be required to give bond according to law.

Upon the presentation of this petition, the

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relators obtained an order that "a writ of mandamus in the alternative form be issued to William Broderick" et al. "commanding them to appear and show cause why the prayer of petitioners should not be granted;" that is, they procured an order for a writ of alternative mandamus commanding the defendants to show cause why a writ of alternative mandamus should not be issued.

So far as we can see no writ of alternative mandamus in any form was issued. Some sort of notice appears to have been given to the defendants, as they afterwards appeared and filed what they call a demurrer and answer, assigning three grounds of demurrer, which are that the petition should be filed against each director separately, and that separate and distinct charges are made against different defendants and different relief asked, and that the petition is informal and insufficient.

If we are to treat the proceeding as one in which the issue of a writ of mandamus has been weighed and as if such a writ had issued commanding the defendants to do the things asked for in the petition, then, of course, a demurrer would be an unheard of proceeding. The duty of a man who receives the commonwealth's writ, commanding him to do something, is to obey it, and not to demur. If, on the other hand, we treat the proceeding as the grant of a rule to show cause why a mandamus should not issue, then the proceeding is wholly irregular, because the act of June 8, 1893, has abolished the practice of granting such rules and directs that upon presentation of the petition, if it presents the substance of a cause for mandamus, the court shall direct that such writ shall issue in the alternative form. In order that these anomalies may be removed from the record, we are of opinion that the only proper course is to revoke the order made upon the presentation of the petition. The petitioners can then present the petition for the making of a proper order thereon, either in its present form or amended as they may be advised.

While we do not, under the circumstances, undertake to discuss the questions raised by the demurrer above mentioned, we think it proper to say for the information of the plaintiffs that a writ in the precise form asked for by them certainly can not be issued by reason of the joinder of various unconnected matters and also by reason of the inclusion of matters which are not the subject of mandamus.

And now, October 8, 1906, it is ordered that the order of July 14, 1906, directing the writ of mandamus to issue to the defendants, commanding them to appear and show cause why the prayer of the petitioners should not be granted, is set aside and revoked, and all subsequent proceedings in the case are set aside, plaintiffs to have leave to apply for a proper order upon the present petition or an amended petition to be presented by them.

For plaintiffs, *Wm. M. McElroy.*

For defendants, *Marron & McGirr.*

Court of Quarter Sessions,

MERCER COUNTY.

COMMONWEALTH v. GRAFF.

Criminal law—Aggravated assault and battery. Act of March 31, 1860, section 98.

Section 98 of the penal code of March 31, 1860, P. L. 382, embraces two kinds of injuries, each of which constitutes the offense of aggravated assault and battery: (a) where a grievous bodily harm is unlawfully and maliciously inflicted, either with or without a weapon, and (b) where a person unlawfully cuts, stabs or wounds another, with a weapon or instrument of some kind. And the distinction between the two paragraphs of this section is that the offense is committed under the first paragraph, when grievous bodily harm is inflicted unlawfully and maliciously, either with or without a weapon, while under the second paragraph, the offense is committed by a cut, stab or wound, unlawfully inflicted, with some weapon or instrument, whether injury amounted to a grievous bodily harm or not, and whether it was inflicted maliciously or not.

No. 7 October Term, 1906. Motion by defendant for a new trial, after conviction for aggravated assault and battery.

Opinion by WILLIAMS, P. J. Filed December 17, 1906.

The reasons filed in support of this motion are as follows:

"1. The commonwealth's attorney, in

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his argument to the jury, misstated the law, arguing that it was not necessary under the law to find that the defendant committed the assault maliciously.

"2 That the jury was misled by the court in the colloquy between the defendant's counsel, the court and the commonwealth's counsel, the court leaving the impression in said colloquy that it was enough, if the assault was unlawful; and reading the act of assembly in a manner that would imply this."

The indictment on which the defendant was convicted is framed under section 98 of the act of March 31, 1860, which reads as follows:

"If any person shall unlawfully and maliciously inflict upon another person, either with or without any weapon or instrument, any grievous bodily harm, or unlawfully cut, stab or wound any other person, every such person shall be guilty of a misdemeanor."

Counsel for the commonwealth and the defendant widely differed in their construction of this section of the act of assembly. Counsel for the defendant earnestly contended that there could be no conviction of aggravated assault and battery unless the jury should find that the injuries complained of were "unlawfully and maliciously" inflicted as provided in the first paragraph or clause of the section above quoted from the act of assembly; while counsel for the commonwealth argued that malice is not a necessary ingredient or element of a conviction under the language of the second paragraph. The language of the second paragraph, which is preceded by a comma, is, "or unlawfully cut, stab or wound any other person," . . the word "maliciously," as used in the preceding paragraph or clause, being omitted.

It seems that the respective counsel argued their views as to this matter to the jury, although we were busily engaged at the time in the preparation of a brief outline from which to charge the jury, and did not pay particular attention to the arguments of counsel. At the close of the arguments, counsel for the defendant called the attention of the court to the line of argument indulged in by the counsel for the commonwealth, and insisted that he misstated the law, and probably requested the court to so say to the jury. This brought on an altercation between counsel, in which they each maintained their views as to the law in the case, and the court read the section of the act of assembly, above quoted, and stated that it presumed that counsel for the defendant based his argument on the first paragraph of the section, while counsel for the commonwealth based his on the latter paragraph or clause. It is perhaps unfortunate that no request was made to have the colloquy between counsel, and the remarks made by the court, placed on the record, but, as a result and culmination of the matter, the court stated to counsel that it would take care of the matter in charging the jury, and this we endeavored to do.

On the argument of this motion, two questions were discussed by counsel: (1) That to warrant a conviction of aggravated assault and battery under the indictment, the injuries on which the prosecution is based must have been inflicted both unlawfully and maliciously; and (2) That the counsel for the commonwealth misstated the law to the jury, and the court should have expressly so charged the jury.

As to the first question, the act of assembly states the elements of aggravated assault and battery to be, where "any person shall unlawfully and maliciously inflict upon another person, either with or without any weapon or instrument, any grievous bodily harm, or unlawfully cut, stab or wound any other person." These clauses or paragraphs are in the disjunctive and seem to embrace two kinds of injuries which shall constitute the offense of aggravated assault and battery: (a) Where a grievous bodily harm is unlawfully and maliciously inflicted, either with or without a weapon, and (b) Where a person unlawfully cuts, stabs or wounds another, with a weapon or instrument of some kind.

It is by no means impossible that a grievous bodily harm might be inflicted upon another without any weapon or instrument, and yet there be no wounding within the meaning of the term "wound." The term "wound" is defined as "to hurt by violence; cut, slash or lacerate; injure; damage." Century Dictionary.

"Without the meaning of 9 Geo. IV (1829) c. 21, s. 12, an injury to the person by

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which the skin is broken—the whole skin, not the cuticle merely." Anderson Law Dict., Title, Wound. "Breaking a limb was not, then, a wounding; nor was biting off a finger, or the nose; nor was throwing of acid in the face—because, in such cases no instrument inflicting at least a skin wound was used." Ibid. And cases cited.

"The term 'wound' has had two distinct interpretations given to it: the first, under the ordinary common law indictments for homicide; the second, under the English and American statutes, making 'wounding' specifically indictable" 1 Whart. Crim. Law, section 533.

"When the term 'wound' is used in an indictment for homicide . . . , the term is used in a popular sense, and is understood to include bruises, etc. Where, however, the indictment is under a statute making 'wounding' specifically indictable, the construction varies with the terms of the statute. Under 7 Will., 4 and 1 Vict., which makes it indictable to 'stab', cut, or wound, etc., it was held by Lord Denman, C. J., and Park, J., in 1837, that a blow given with a hammer on the face, whereby the skin was broken internally but not externally, was a 'wounding.' But in 1838, Coleridge, J., Bosanquet, J., and Coltman, J., held that a blow with a stone bottle, which did not break the skin was not a wounding; and the court said, 'to constitute a wound, that the skin should be broken, it must be the whole skin, and it is not sufficient to show the separation of the cuticle only.'" Ibid.

"But under the statute the injury must be inflicted by 'some instrument, and not by the hands or teeth;' and hence biting off the joint of a finger, and biting off the end of the nose, have been held not 'wounding' within the statutes. And so of injuries inflicted by throwing oil or vitriol in the face. But it is otherwise with an injury inflicted by a kick from a shoe." Ibid.

We have been unable to find any legal definition of the term "wound" that conflicts with the definitions above given, and the words, "stab, cut or wound," as used in the statutes referred to by the learned author above quoted, are identical with the words of the section of our statute, a construction of which is involved in this case. It is, therefore, fair to presune that the legislature, in using the term "wound," understood its legal significance and used it advisedly, and by the second paragraph or clause of Sec. 98 of the act of 1860, provided that to unlawfully wound another should constitute the offense of aggravated assault and battery, whether the wound was inflicted maliciously or not; the distinction between the two paragraphs of this section being that a grievous bodily harm inflicted upon another, with or without any weapon or instrument, should constitute an assault and battery within the meaning of the first paragraph, while a wounding which must have been made by some weapon or instrument would, of itself, constitute the offense, whether the injury amounted to a grievous bodily harm or not.

In addition to the authorities already cited, the counsel for the commonwealth cites to the court 4 Century Digest, column 995, section 84, and 3 Cyc., 1031. We do not have access to these authorities, but the counsel quotes from the citation in 3 Cyc., as follows: "To constitute a wound there must be an injury by which the skin is broken either internally or externally. Malicious intent is not an element of this offense."

In view of these authorities as to the legal definition of the term "wound," as used in the second clause or paragraph of section 98 of the act of 1860, in connection with the word "unlawfully," and omitting the word "maliciously," used in the preceding paragraph, and said paragraphs being in the disjunctive, we are led to the conclusion that the legislature intended that the unlawful wounding of a person—which, under the definitions already given, must be by the use of some weapon or instrument—should constitute the offense of aggravated assault and battery, whether the wound was maliciously inflicted or not.

If, however, we are in error as to this conclusion, we are of opinion that this motion must be decided against the defendant on the other grounds alleged for a new trial. The learned counsel for the commonwealth contended in his argument that neither of the questions discussed on the hearing of this motion were properly before the court,

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for the reason that there had been no demand made to have the remarks of counsel spread on the record, nor was any exception taken to that matter or to the charge of the court. This is technically true, in so far as there being no exception that would avail the defendant in case of an appeal, but we have preferred to consider the whole case as though regularly before the court on exceptions duly taken, and our decision in the matter is in no way influenced by the fact that no exceptions appear of record. Nor would we now hesitate, if we had the power, to grant an exception to the defendant.

We come now to the second reason urged in support of this motion, which we will consider from the standpoint that the learned counsel for the defendant is right in his contention that malicious intent is one of the necessary elements to sustain a conviction under the second paragraph of the section of the act of assembly already referred to.

A reference to the charge of the court will show that we first quoted to the jury section 98 of the act of 1860, and followed it immediately by the following instruction to them: "The issue you are to try is whether this defendant did unlawfully and maliciously inflict upon the person of James McDonough the wounds that have been testified to by the prosecutor and his brother, and as testified to by the doctor, in this case. The real question is whether those wounds were inflicted in such a manner as would make the defendant guilty of the offense charged in this indictment."

This was followed by a discussion of the testimony of the witnesses on both sides, and as to the duty of the jury in determining the credibility of the various witnesses and the weight that should be given to their testimony, at the conclusion of which we said: "The burden of proof is upon the commonwealth, and the defendant stands here with the presumption of innocence in his favor; and unless the evidence satisfies you, beyond reasonable doubt, that this defendant inflicted these injuries upon James McDonough unlawfully and maliciously, then your verdict should be not guilty."

In concluding our charge, we said: "So you will take the case, gentlemen. It is a case of some considerable importance. It has been fully argued before you. You have heard all of the testimony. We have endeavored to give you the law as we understand it. You will take the law from the court, and if we have made a mistake it can be corrected. Take the facts from the witnesses, and determine by your verdict whether you are satisfied beyond reasonable doubt that this defendant did unlawfully and maliciously inflict these injuries upon James McDonough, and if so satisfied, return a verdict under this indictment.

Hence, it appears that at the very beginning of our charge, again at the conclusion of our discussion of the testimony of the various witnesses called, and again at the close of the charge, we expressly instructed the jury that they must be satisfied beyond reasonable doubt that these injuries were inflicted by the defendant unlawfully and maliciously, or there could be no conviction under the indictment.

As we understand the learned counsel for the defendant, he does not even now take any exception to the charge of the court, but maintains that, owing to the colloquy between himself and the counsel for the commonwealth, and participated in to some extent by the court, the court should, at the time, have told the jury that the counsel for the commonwealth was wrong in his argument of the law to them, and that the jury were misled by the failure of the court to do so. If we were convinced that the jury had been misled by anything said by the court during the progress of the trial, or in charging the jury, we would not hesitate to grant a new trial. As we now view the matter, if any error was made as to the law governing this case, the error was in favor of the defendant rather than against him. It follows, therefore, that the motion for a new trial must be refused.

And now, December 17, 1906, this motion came on to be heard and was argued by counsel, whereupon, after due consideration, the court being of the opinion that no error prejudicial to the rights of the defendant was committed in the trial of this case, the motion for a new trial is refused.

For commonwealth, *T. C. Cochran*, *H. L. Keck* and *W. C. Pettit*.

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For defendant, *Guy Thorne* and *S. H. Miller.*

[From James D. Emery, Esq., Mercer, Pa.]

EQUITY. (INJUNCTION—REMEDY AT LAW.) MASS.—A case involving some fine points of law is Berry v. Friedman, 78 Northeastern Reporter, 305. Plaintiff therein had rented a piano to a tenant of defendant. By reason of the dimensions of the piano, the tenant was unable to move it into her apartments except by enlarging a window which opened into it. Defendant allowed this to be done, and promised his tenant that she might remove the piano in the same way whenever that should be necessary.

The lease on the piano having expired, plaintiff endeavored to remove it, but defendant while insisting that the plaintiff must remove it, refused to allow this to be done in the only way practicable by refusing to allow any opening to be made by which it could be moved, the piano being so constructed that it could not be removed in sections without destruction, or in any other way than that in which it was placed in defendant's house.

Plaintiff thereupon sought the aid of a court of equity to compel defendant to remove the piano in the same way in which it was moved in. It was contended that plaintiff had an adequate remedy at law, but the court was of the opinion that plaintiff could not obtain relief by an action of replevin, as the officer would be under the same difficulty in removing the piano as plaintiff himself. Furthermore, plaintiff could not maintain conversion since defendant did not set up any adverse title to the piano or exercise any control over it, but on the other hand admitted plaintiff's ownership. Though defendant had made no promise to plaintiff that the piano could be removed in the same manner as it was moved in, the court was of the opinion that as defendant had made such promise to the lessee of the piano and therefore contemplated that the piano should be removed by enlarging the opening of the window, plaintiff was entitled to a decree allowing him to do so on giving sufficient security.—*The Green Bag.*

American Bar Association.

The executive committee, at its meeting in New York on December 28th, determined to hold the annual meeting of the American Bar Association at Portland, Maine, on Monday, Tuesday and Wednesday, August 26, 27 and 28, 1907. The reason for selecting Monday, Tuesday and Wednesday is that the International Law Association is considering holding its meeting in America this year, and the suggestion has been made to that body to hold its meeting at Portland on the last three days of said week.

JOHN HINKLEY, Secretary.

The right to adjudge invalid, in a proceeding to which the holders are not parties, warrants issued by a county, is denied in State ex rel. Reed v, Gormley, (Wash.) 3 L.R.A. (N.S.) 256.

Making the taking of more than 2 per cent interest a month for the loan or forbearance of money a crime is held, in Re Berger (Mo.) 3 L.R.A.(N.S.) 530, not to be beyond the legitimate powers of the legislature.

Where a New Jersey corporation operating factories, mills or mines in various States, has its principal office in the city of Boston, where the supreme direction and control are exercised and the bulk of sales is negotiated and bills sent out and payments received, where also its directors meet, its books of account are kept and its general correspondence conducted, held, in Matter of Matthews Consolidated Slate Co., 16 Am. B. R. 407, that it is subject to the jurisdiction of the Bankruptcy Court in the District of Massachusetts, as its "principal place of business" must be held to be therein.

The popular movement, looking towards the abolition, or at least regulation, of billboards, meets with some local discouragement in the case of City of Passaic v. Paterson Bill-Posting, Advertising & Sign Painting Co., 62 Atlantic Reporter, 267, where an ordinance requiring that sign-boards shall be constructed not less than ten feet from the street line, and that no sign or billboard shall be at any point more than eight feet above the surface of the ground, is held to be a regulation not reasonably necessary for the public safety, and not justified as an exercise of the police power.

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PITTSBURGH, PA., JANUARY 30, 1907.

Court of Common Pleas No. 2,

ALLEGHENY COUNTY.

LEVENSON v. CITY OF PITTSBURGH et al.

Market-house—Stalls—Power of director of public works.

B had a lease given by the director of the public works department on a stall in the Pittsburgh market expiring April 1st and received notice to vacate on that date. The director leased the stall to A for four years and A took possession. A few days later a new director notified A to vacate and on his refusal ejected him forthwith and put B in possession.

Held, on motion for a preliminary injunction that without deciding whether A's lease was valid or merely a revocable license, the proceeding was too summary and A should be allowed to retain possession until the matter could be finally determined.

No. 67 July Term, 1906. In equity.

Opinion by YOUNG, J. Filed April 24, 1906.

This is an application for a preliminary injunction to restrain the city of Pittsburgh, J. W. Clark, director of the department of public works, the servants, agents and employes of the city, and I. B. Pulpress, from in any manner interfering with the plaintiff in possession of stall No. 45 of the Diamond Market of the city of Pittsburgh, and came on to be heard on bill and oral evidence.

The evidence establishes that prior to April 1, 1906, stall No. 45 in the Diamond Market had been during the previous year occupied by the defendant, Pulpress, under a lease from E. M. Bigelow, the then director of the department of public works of the city of Pittsburgh, and that on the 30th of December, 1905, three months prior to April 1, 1906, Pulpress had been notified in writing to give up possession on or before April 1, 1906.

On or about March 21, 1906, E. M. Bigelow, director of the department of public works, made and delivered to Max Levenson, under the firm name of Levenson Fish & Oyster Company, the plaintiff, a lease for four years from April 1, 1906, for stall No. 45, and upon April 2, 1906, the plaintiff took possession of the stall, although there remained in the stall the fish-box, cash register and scales of Pulpress, the former occupant, and the plaintiff continued from April 2, 1906, until April 7, 1906, to occupy the stall and to carry on business there.

On April 7th J. W. Clark, the new director of the department of public works, thereto appointed on April 2, 1906, left with the employes of the plaintiff, while the plaintiff was absent, between two and three o'clock in the afternoon, a written notice that the department of public works did not recognize the plaintiff's lease as valid, and directing him to vacate the premises forthwith; and within a few minutes, while the plaintiff was still absent, upon the employes of plaintiff refusing to vacate the premises, the director of the department of public works, through the market constable and his assistants, subordinates of the department of public works, and with the aid of the city police, subordinates of the department of public safety, arrested the employes of the plaintiff and carried them with the cash register to the Central police station where they were imprisoned.

Other subordinates of the department of public works then removed the goods of the plaintiff from the stall, and entirely dispossessed plaintiff and delivered up to I. B. Pulpress possession of the stall, and he still remains in possession.

The arrest, the dispossession of the plaintiff and the delivery of possession to Pulpress were all done on Saturday afternoon while plaintiff by his employes was carrying on his business at, possibly, the most busy hours of the market, and in the presence of an assembled crowd of fifteen hundred to two thousand people.

From these facts we conclude that the

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contract of Pulpress for the occupancy of stall 45, prior to April 1, 1906, whether we call it a lease, license, or simply an agreement to occupy the stall, had terminated by the action of the then director of the department of public works, and after reasonable notice, and the then director of the department of public works, Mr. Bigelow, had the authority to make a contract for the occupancy of the stall, which he did upon March 23, 1906, with the plaintiff, as shown by exhibit one.

Without now deciding whether the director of the department of public works had authority to make a lease for a term of years or only had authority to grant a revocable license for the stall, he certainly had sufficient authority, as the director of the department of public works, under whose dominion the market house was, to grant to the plaintiff the right to occupy the stall, and he did grant to plaintiff that right and put him into possession of the same. The plaintiff having come into possession, having stocked his stall with goods, and being then in the orderly transaction of business, was entitled to a reasonable notice before being turned out of possession. The turning of plaintiff out of possession by the arrest of his employes, in the absence of plaintiff and without a reasonable notice to him, and the selection of the busy market hours of Saturday afternoon when the market was thronged with people, was not an orderly proceeding to dispossess and was so inconsiderate of the rights of the plaintiff who had gone into possession of the property under a valid right to possession granted by the person having charge under the charter of the city, whether that right was for a term of years or only at the will of the director of the department of public works, that the court is warranted in restoring matters to the condition existing prior to the dispossession of plaintiff by putting the plaintiff back into possession, when the parties can settle their differences by a legal and orderly proceeding in the courts, either in this proceeding upon final hearing, or by an action at law.

A mandatory injunction will issue, restoring plaintiff to his possession of stall No. 45, and restraining all the defendants from interfering with plaintiff's possession of stall No. 45, or with his business there, until the final hearing of this case.

Let a decree be drawn accordingly.

SAME v. SAME.

Market-house—Stalls—Licenses—Revocable.

The act of March 7, 1901, regulating second class cities places market-houses in charge of the director of public works but otherwise does not expressly give him any authority.

In the absence of an ordinance regulating the matter the director could only give licenses to occupy stalls which are revocable on reasonable notice.

A lease of a stall for four years is clearly void.

Opinion by SHAFER, J. Filed October 6, 1906.

The bill is for an injunction to restrain the city of Pittsburgh, the director of the department of public works and I. B. Pulpress from interfering with the possession of plaintiff of a stall in the Pittsburgh market.

FINDINGS OF FACT.

1. The city of Pittsburgh has for many years maintained a public market in the Diamond square in that city under the general authority of law for the maintenance of such a market and the various acts of assembly concerning the government of the city.

2. It has been the custom for many years for the department of public works, or the equivalent department under prior charters of the city, to make leases of the stalls in the market usually for one year, but sometimes, as it appears, for three years. It is disputed between the parties whether any leases were ever made for four years before the lease in question in this case, and it does not fully appear what the fact is in that respect.

3. I. B. Pulpress has for many years been the tenant or occupant of stall No. 45 in that market, and in the winter of 1905 and 1906 was in possession of it under a lease from the director of public works for one year from the first of April, 1905. In December, 1905, he received due notice to quit under the landlord and tenant law.

4. On March 23, 1906, the director of

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public works of the city of Pittsburgh, whose term of office was then about to expire in a short time, made to Max Levenson, the plaintiff herein, a lease of that stall for four years from the first of April, 1906, a copy of which is attached to the bill, the lease being made in the name of the city of Pittsburgh, subject to the rules, ordinances and regulations for the governing of markets, now in force or which may hereafter be adopted by law, and signed by the director of the department of public works.

5. On the morning of April 2nd, the first of April being Sunday, the plaintiff went early in the morning, before the usual hour for opening the market, to the market-house and took possession of stall No. 45, except the office connected with the stall of which he did not obtain possession, and plaintiff continued in possession until April 7, 1906.

6. On April 7, 1906, the director of the department of public works, being a different director from the officer who had made the lease to the plaintiff, gave notice in writing to the plaintiff that the department did not recognize that he held a valid lease for that stall, and he was accordingly directed to vacate the premises forthwith. This notice does not appear to have been served upon the plaintiff personally, but was presented about three o'clock in the afternoon of Saturday to his employes at the stand in question, and upon their refusal to vacate at once, the police of the city under the direction of the department of public works removed the goods of the plaintiff from the stand and arrested his employes and took them away in the patrol wagon to the police station; and thereupon Pulpress went into possession, whether under his former lease or some newly acquired right does not appear. From this state of facts plaintiff applied for a preliminary injunction, and such an injunction was granted on April 24, 1906, upon the ground, as stated in the opinion of the court at that time, that whatever might be the rights of the director of the department of public works in the making of a lease, he had sufficient authority, as director of the department under whose dominion the market-house was, to grant to the plaintiff the right to occupy the stall and to put him into possession of it, and that having come into possession of the stall upon the faith of that and stocked it with goods, he was entitled to some reasonable notice before being turned out of possession, and that the manner in which he was turned out was such as to warrant the court in restoring the status quo before that proceeding, and in putting the plaintiff back in possession, so that the rights of the parties might be settled in an orderly way. The plaintiff is therefore now in possession under this order for preliminary injunction.

There are no ordinances of the councils of the city of Pittsburgh regulating the market in this respect or providing for the leasing of stalls or authorizing anyone to make leases thereof for the city.

CONCLUSIONS OF LAW.

1. The city of Pittsburgh, being a city of the second class, is governed by the act of March 7, 1901. We can find nothing in this act which would authorize the director of the department of public works to dispose of stalls in the city market. He is given charge of market-houses along with other public buildings and real estate generally of the city, and is no doubt empowered in a general way to regulate their use from time to time, if no other provision for their regulation is made by law or by ordinance. The councils of the city are authorized by the act of 1901 to erect market-houses or to treat with persons for the erection and regulation of market-houses. The only ordinance which has been offered in evidence is one of January 7, 1902, which establishes a bureau of city property and directs that the bureau shall take charge of all public property belonging to the city, and not otherwise conferred upon some other department, including markets, city buildings, wharfs, docks and other property of the city not especially conferred elsewhere.

2. We are clearly of opinion that the lease or agreement made with the plaintiff for four years use of the stall in question is beyond the power of the director of public works to make, and that any so-called lease of a market stall by the department of public works is a mere license not binding upon the city as a conveyance of any sort of title or estate in the stall. It does not follow

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that, if one has been put in possession of a stall by the director of public works, his license or right, whatever it may be, can be terminated at any time at the pleasure of the director. The time which the so-called lessee of a stall might have a right to retain a stall after being placed in possession of it by the director of public works under his above mentioned power of supervision of the market-house, would depend largely on the nature of the business for which the stall was given him, the character of the apparatus or other fixtures which he might be allowed to place in the stall and other considerations. A farmer or gardener who was allowed to occupy a stall for the sale of vegetables might be turned out of possession without injustice upon a very short notice, which would be too short in the case of one who carried on a business requiring the purchase of goods at some considerable time in advance of their sale, or which required special apparatus for their preservation or other similar reasons.

3. It seems perfectly plain that only the city councils, either by direct action in each case or by a general ordinance regulating the matter, can grant the stalls in the city market in any other way than that above described. It seems somewhat remarkable that no such action appears to have been heretofore taken by councils. If our view of the law as to the powers of the director is correct, it will certainly leave the tenure of stalls in the market in such a condition as to injure the market generally for the purpose for which it is maintained. The tenure of stalls in the market for a reasonable time to enable the holder to establish a reputation, which it is of value to him to retain, is certainly for the best interest of the purchasing public, and it would seem to us proper and in fact necessary for the maintenance of the efficiency and usefulness of the market that a just method of disposing of the stalls for reasonable terms ought to be provided by ordinance.

4. Being of opinion, therefore, that the lease or instrument held by the plaintiff in regard to the stall in question does not give him a right to retain the same after a reasonable notice to quit from the department of public works, we are of the opinion that the plaintiff is not entitled to the relief prayed for.

5. Under the circumstances of this case, we are of opinion that the costs should be divided equally between the parties plaintiff and defendant.

Let a decree be drawn dismissing the bill, one-half of the costs to be paid by the plaintiff and the other half by the defendants.

SAME v. SAME.

Appeals—Supersedeas.

In an application for a supersedeas on appeal to the Supreme Court it appeared that appellant had been put in possession under a decree on the motion for a preliminary injunction. Held, that a supersedeas should not be allowed.

Opinion by SHAFER, J. Filed December 8, 1906.

We are asked to fix the amount of the bond to be given by the plaintiff in this case for an appeal from the decree herein, and to make an order that such appeal shall operate as a supersedeas.

It is undoubtedly usual to make an appeal of supersedeas upon the giving of a proper bond, so as to preserve the status quo until the final determination of the case. It appears, however, from the evidence and findings of fact in this case that the plaintiff was not in possession of the market stand, which is the subject of controversy, when the bill was filed, and was put back in possession because of the manner in which he had been deprived of possession by the city authorities, and he has had for six months and upwards the use of a market stand which the decree has determined he was not entitled to.

It further appeared upon this application that the plaintiff in this case, or his firm, has obtained possession of half, or nearly half, of all the fish stands in the Pittsburgh market; that he had one before the present leases were made; that he obtained possession of the one in question in the present case by the lease in question herein, and that he is substantially the owner and has control of the stand which is now involved in the case of *Charles Kephart* v. *City of Pittsburgh*, at No. 68 July Term, 1906, which

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was tried with this case. It was alleged and offered to be proved, and not denied on the hearing of this application, that Charles Kephart never was in the fish business, that he was a barkeeper in a hotel in the city before the lease was made to him, and still is employed as such, and that the stand leased to him is in possession of Levenson.

Under all the circumstances of the case we are of opinion that the appeal should not be made a supersedeas. It is directed that the bond for appeal be fixed at the sum of $500 conditioned according to law.

For plaintiff, *F. W. Hughey* and *Thomson & Thomson.*

For Pittsburgh, *Wm. B. Rodgers.*

For Pulpress, *Breck & Vaill.*

(Common Pleas No. 2, Allegheny Co.)

ROTHEY v. WORCESTER.

Estrays—Damages—Act of April 13, 1807.

Under the act of April 13, 1807, in regard to estrays notice of the hearing before the viewers must be given to the owner of the estray. In default of such notice the proceeding to collect damages is void.

No. 180 October Term, 1906. Certiorari.

Opinion by SHAFER, J. Filed September 15, 1906.

The proceeding before the justice brought up by this writ is under the act of April 13, 1807, in regard to strays. From this record it appears that Worcester made complaint before the justice of a stray found upon his lands, alleging that he had taken up the straying animal, and that he gave notice thereof to Rothey, the plaintiff in error, as the owner; that, thereupon, the justice issued his warrant to three freeholders to value and appraise the damages, according to the act, and that on the next day the viewers so appointed reported that they had viewed the trespass, etc., and had assessed the damages at a certain amount. On the next day a summons was issued to a constable, returnable on the fourth day thereafter, which was served three days before the return day. On the return day the defendant did not appear, and the justice thereupon entered judgment for the award. This is all in accordance with the act of assembly above mentioned, except that that act does not provide for the issue of a summons to the supposed owner of the stray after the award of the viewers, but directs judgment to be entered by the magistrate upon that award. If the judgment is to be regarded as founded upon the summons in debt, it can not be sustained for the reason that the issue and the service of the summons are not within the time required by the act of assembly in such cases. It is contended, however, by counsel for defendant in error that the proceeding by summons was entirely unnecessary and that the justice was empowered to enter judgment upon the award without such a summons. This we understand to be the meaning of the act. While there is no direction in the statute that notice of a hearing before the viewers should be given, that must be implied, although the magistrate ought not to be criticized for not making the implication. Otherwise the proceeding would not be "due process of law." This was held to be the law by Judge Archbold in the common pleas of Lackawanna county in the case of *Shulz v. Quinn*, 2 Lackawanna Legal News, 141, in an opinion which fully vindicates this conclusion.

As this record discloses no notice whatever to the supposed owner of a meeting of viewers, the judgment must be reversed.

For plaintiff in error, *James M. Nevin.*

Orphans' Court,

WASHINGTON COUNTY.

In re Estate of HENRY AMOS, Deceased.

Auditor's report—Findings of fact—Exceptions.

The court will not disturb the findings of the auditor on questions of fact unless there is absolutely no evidence to support them.

No. 64 November Term, 1905. Exceptions to auditor's report.

Opinion by TAYLOR, J. Filed January 18, 1907.

We do not understand that any of the numerous exceptions filed to the auditor's report in this case relate to the disposition

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of the fund derived from the sale of real estate wherein the principal is invested during the lifetime of the widow and she to receive the interest on the same. This is fully authorized by the will of the husband, the deceased, who gave her a farm during her life and if she saw fit to part with her use of any of the real estate at any time prior to her death in the absence of an agreement to the contrary, she would be entitled to receive the income from a fund so derived. The numerous exceptions filed nearly all relate to the finding of the auditor that certain witnesses, whose testimony was offered before him, were declared incompetent to testify or rather that he excluded their testimony from consideration in reaching the conclusion arrived at, and relating to exhibit "B," which is attached to the auditor's report, purporting to be an assignment from C. S. Amos to his sister, Lizzie Pease. The auditor, after discussing the testimony, finds against the validity of this assignment exhibit "B" and among other reasons, says that a witness who gave important testimony in support of the validity of the assignment was not only a "biased witness" but "showed considerable bias on the witness stand" before the auditor. The auditor further says "he is contradicted by George B. Amos whose name is signed to the alleged assignment exhibit "B" presumably as a witness thereto, who denies positively that he signed his name to the paper at the time it was alleged to have been executed or that he was present when such a paper was signed by C. S. Amos." And the auditor further finds that "the testimony of W. H. Amos and Jesse Amos, in conjunction with that of George B. Amos, above referred to, throws such a cloud upon the alleged execution of the paper marked exhibit "B" that the auditor is forced to ignore the said assignment of C. S. Amos to Elizabeth Pease for the reason that it is not supported by sufficient competent evidence." An examination of the notes of testimony and the exhibits referred to discloses the fact that there is considerable discrepancy among the witnesses concerning the regularity and genuineness of the execution of this exhibit "B." The auditor had the witnesses before him who testified in relation to this matter and says in his report that one of them "showed considerable bias on the witness stand." In this finding apparently from the testimony and the appearances of the witnesses on the stand we are confronted with the rule in relation to exceptions to auditor's reports where they relate to matters of fact, that the court will not disturb the findings of the auditor on questions of fact unless there is absolutely no evidence to support them, and when the auditor basis his findings, as he does in this case, with relation to this assignment, upon the testimony of witnesses and their manner of testifying on the stand and there being evidence in the case in support of his finding, we would not be justified in disturbing them.

And now January 18, 1907, these exceptions to the auditor's report came on to be heard and were argued by counsel, whereupon a review of the testimony and the whole case the exceptions are all dismissed and the report of the auditor confirmed absolutely.

For exceptions, *H. L. Williams.*

Conta, *T. F. Birch* and *Harry Russell Myers.*

[From Harry Russell Myers, Esq., Washington, Pa.]

Court of Common Pleas,

WASHINGTON COUNTY.

WOODS v. U. S. NOVELTY CO. et al.

Equity—Demurrer to bill by receiver of an insolvent corporation for collection of unpaid subscriptions to pay debts.

A receiver of an insolvent corporation filed bill against the individual stockholders of a corporation for an accounting and to recover the amount remaining unpaid by said stockholders on their subscriptions to the capital stock of said company, to be applied to the payment of the debts and liabilities of the same, joining as defendants each stockholder who appeared on the books as owing for subscriptions and also the corporation. Defendants demurred to bill. Held, Receiver a proper party to bring action.

No. 1642. In equity. Demurrer to bill by receiver of a corporation for discovery and accounting of the stockholders of said corporation to recover the amount remaining

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unpaid by said stockholders on their subscriptions to the capital stock of said company to be applied to the payment of the debts and liabilities of the same.

Opinion by TAYLOR, J. Filed January 18, 1907.

There seems to be ample authority to hold that upon the insolvency of a moneyed corporation all uncalled for and unpaid capital stock constitutes a trust fund for the benefit of all its creditors and will be administered as such, and that a bill in equity will lie at the instance of judgment creditors of said corporation to collect such part of the unpaid and uncalled for subscription to the capital stock as it is necessary for the satisfaction of their debts, and where a corporation is in the hands of a receiver the receiver is the proper party to sue for the collection of its assets and not the creditors. *Lane's Appeal*, 105 Pa. 62; *Bell's Appeal*, 115 Pa. 88; *Cushing* v. *Perot*, 175 Pa. 76; *Lipper's Appeal*, 212 Pa. 167.

The most authorative works upon equity recognize that the receiver of an insolvent corporation, appointed for the purpose of winding up their affairs, is recognized not only as the representative of the corporation but also of its creditors and under his duties as representative of the last class he is invested with power and may do acts that could not be done by a mere representative of the corporation. The bill avers that the certificates of capital stock of said corporation purporting to be fully paid were issued by the said corporation to each of said incorporators, naming them, in the number set opposite their respective names in the second paragraph of the bill, and the receiver avers that he is informed and believes that the said shares so issued to the incorporators named in said bill, purporting to be fully paid up, were not fully paid up and that the books of the said company failed to disclose how much was paid by said incorporators. We think the averments in the bill are sufficient to call upon the defendants to make answer thereto.

And now, January 18, 1907, after argument on demurrer and upon due consideration the demurrer is overruled and dismissed and the defendants and each of them directed to make full answer under oath to the bill of complaint.

For receiver, *Harry Russell Myers.*

For demurrer, *Albert S. Sprowls.*

[From Harry Russell Myers, Esq., Washington, Pa.]

Practice Reform.

Few of our readers outside the state of Illinois will realize that its legal practice is nearer the pure practice of the old English common law than any other jurisdiction, not excepting England itself and its colonies. The conservatism or indifference which has maintained this ancient system of pleading and practice is, however, being awakened by the report of a commission appointed to suggest reforms in practice and by the submission of a special jury act by the Chicago Bar Association to the coming session of the legislature. The absurdly extended contest over the empanelling of jurors in some hotly contested criminal cases in Chicago in the last few years has emphasized the necessity for the latter reform. Other states which are considering the same problem will be interested in the details of this act which it is impossible to discuss at length here. The National Corporation Reporter says, however, "It doubtless will secure a much more intelligent class of jurors, and, in the hands of a judge who has a wholesome contempt for the jury system and who will allow special juries with great liberality, the law may lead to excellent results. It does not remedy and does not attempt to remedy the most serious evil of the jury system—the evasion of service by those most competent to serve, on one pretext or another. This can be met only by a radical reform which would remove the serious hardships necessary incident to the system as it now exists, the mere enumeration of which would tax the space at our disposal." A suggestion, however that it will be better to impose a charge or fine upon those claiming exemption and to increase the fees paid those who serve seems unlikely to be effective since it would be impossible to offer adequate financial inducement for services, and the very ones who are the most desired on the panel would find it easiest to escape.—*The Green Bag.*

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Judge Brewer on Municipal Bonds.

Another blow at the legal trickster, and that from a high authority, came in the recent address of Justice David J. Brewer of the United States Supreme Court at the meeting at the People's Forum at New Rochelle, New York, in which he called attention to the enormous issues of municipal bonds being put into circulation and the consequent increase in the tendency to contest the validity of these issues by every possible device. He is reported to have said "nearly all the litigation in respect to municipal bonds has ceased to be conducted along the higher levels of honorable and fair dealings but has sunk to the lower levels of smaller technicalities and trivial omissions. On the one hand stands Shylock waiting for his pound of flesh, and on the other hand the legal trickster, who strives to make the omission to cross a 't' or dot an 'i' an excuse for repudiating what was fairly issued and honestly earned. It is not too much to say that the reckless issue of bonds has not only burned the future, induced extravagance in the present, but has also lowered the general moral tone." Any lawyer who has engaged in the lucrative but somewhat wearisome occupation of passing upon the validity of the municipal bonds and has become familiar with the extraordinarily technical problems which have been litigated will appreciate the force of Judge Brewer's contention.—*The Green Brg.*

The right of the legislature to lease farms on which to work convicts, under a constitutional provision that it may place convicts on state farms and "may buy farms for that purpose," is sustained in State ex rel. Greaves v. Henry (Miss.) 5 L. R. A. (N. S.) 340.

Under section 14b of the Bankruptcy Act, as amended, it has been held in In re Harr, 16 Am. B. R. 213, that the obtaining of property on credit, by a bankrupt from any person upon a materially false statement in writing made to such person for the purpose of obtaining such property on credit, may be pleaded by any creditor in bar to the bankrupt's discharge.

A director of a banking corporation is held, in Hart v. Evanson (N. D.) 3 L. R. A. (N. S.) 438, to owe no duty in a legal sense, by reason of his office, to the creditors of the bank or to the public.

Disobeying the law governing the selection of grand jurors is held, Matter of Moran, Advance Sheets, U. S. (1906) page 25, not to affect the jurisdiction of the court, so as to justify the release by habeas corpus of a person convicted under an indictment found by such jurors.

A pedestrian seeking to cross a highway is held, in Hennessey v. Taylor (Mass.) 3 L R. A. (N. S.) 345, not to be bound to be constantly on the lookout to ascertain if auto cars are approaching, under the penalty that, upon failing to do so, his negligence, if injured, must be conclusively presumed.

A judgment of the Supreme Court of the United States to the effect that a policy of fire insurance could not be helped out by any doctrine of the common law, is held, in Northern Assur. Co. v. Grand View Bldg. Asso. Advance Sheets, U. S. (1906) page 27, not to be denied full faith and credit by an adjudication of a state court that such judgment is not a bar to a suit in equity to reform the policy, so that it will express consent to concurrent insurance, and to recover upon such policy as reformed.

Where a partnership the only creditor objecting to a bankrupt's discharge is dissolved and the claim proven by it against the bankrupt estate is charged off to profit and loss, it has been held in In re Hendrick, 16 Am. B. R. 218, that one of the individual partners insisting upon the objections filed is bound to show affirmatively that he is acting in accordance with the wishes of all the joint owners of the claim and that the absence of such proof the bankrupt's exceptions to the report of a special master recommending that his discharge be denied, upon the ground that it snould have been reported that there were no specifications of objection to the granting of the discharge filed by any creditor or any person having an interest in the bankrupt estate, will be sustained.

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PITTSBURGH, PA., FEBRUARY 6, 1907.

Court of Common Pleas No. 2,

ALLEGHENY COUNTY.

MONONGAHELA LIGHT & POWER CO. et al. v. ROSE HILL ELECTRIC LIGHT CO.

Electric light companies—Wires of different companies—Proximity of—Danger—Injunctions. Costs.

Plaintiff, a corporation, by ordinance of the borough of East Pittsburgh enacted in 1896, was given the license to erect poles upon the borough streets and attach wires thereto for the transmission of electricity for lighting purposes and in pursuance thereof struug seven wires along Bessemer avenue. In 1906 councils granted to the defendant, also a corporation, the same right with the proviso that the poles and other appliances be placed along the streets in such manner and such places as the street committee or borough engineer should designate. Defendant erected three poles on said avenue which projected between and above plaintiffs' wires in close proximity to three of plaintiffs' poles upon which defendant strung its wires. Upon bill filed to restrain defendant from erecting its poles and stringing its wires in such close proximity to plaintiffs' poles because of the danger to workmen upon the line and contact of the poles and wires, it was held, that defendant having removed the danger by putting cross-arms upon its poles upon which plaintiffs' wires were strung in accordance with the preliminary decree, the bill should be dismissed as the location of its poles was in accordance with the decision of the borough authorities and defendant had the right to maintain them.

No. 573 July Term, 1906. In equity.

Opinion by OVER (Orphans' Court Judge.) Filed November 23, 1906.

The plaintiffs by virtue of franchises granted to their predecessors in title maintain electric light wires on poles in Bessemer avenue, East Pittsburgh Borough, and the defendant by virtue of a franchise subsequently granted to it has erected three poles which project between and above the plaintiffs wires in close proximity to three of their poles on said avenue, to which the defendant has attached wires and is using them for the transmission of electricity for light purposes. After their erection the plaintiffs filed this bill praying,

First. That a preliminary injunction, hereafter to be made perpetual, might issue against the defendant restraining it from erecting its poles and stringing its wires in such close proximity to the poles and wires of the plaintiffs as to interfere with the transmission of electric current by the plaintiffs;

Second. That the defendant be required and directed to forthwith change its poles and wires now erected and strung so that the said poles and wires of defendant shall be at such a distance from those of your orators as not to endanger the property of your orators and the lives and property of its employes and patrons and of the public general; and

Third. For general equitable relief.

Upon hearing on the application for a preliminary injunction the court made an order directing the defendant, until final hearing, to place cross-arms on the poles erected by it, and to attach to them the plaintiffs' wires, so that there shall be a clearance of at least twelve inches between the poles of defendant and plaintiffs' wires and enjoining the defendant from erecting other poles within twenty-four inches of the plaintiffs' wires.

Although in the bill there is no specific prayer for the removal of defendant's poles from the side of Bessemer avenue upon which the plaintiffs' poles are located, yet the plaintiffs now claim that the defendant should remove them. It is not contended that the plaintiffs have the exclusive right to erect poles and wires on Bessemer avenue for the transmission of electric current; but plaintiffs claim, and a number of witnesses testified, that it is not a safe construction to have the poles of one electric light company extend through the wires of another. The principal objections as stated by the witnesses are the danger to employes going up between the wires, and the liability of the wires to swing out against the poles, when,

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if the voltage is high enough, it will burn either the wire off, or the pole off. The last objection has been removed in this case by the defendant's compliance with the decree of the court directing it to attach plaintiffs' wires to cross-arms placed on defendant's poles. As the defendant's wires are above the plaintiffs, it is the former's employes who run the risk of passing between the wires and not the plaintiffs, and the risk is no greater than if the plaintiffs had an additional cross-arm on its poles and wires attached thereto.

It is contended also by plaintiffs that the defendant could avoid all interference with their poles and wires by erecting its poles on Bryan alley. To do this, however, the defendant's wires would have to cross plaintiffs' wires and those of two telephone systems, and more disastrous results are likely to follow by the contact of an electric light and telephone wire than that of two electric light wires.

A sufficient answer to this contention, however, is the fact that the defendant by the terms of the ordinance granting its franchise is bound to place its poles where the street committee or borough engineer of East Pittsburgh designates, and has erected them as directed by the latter. It is no doubt a better construction to have all the lines horizontal to each other, attached only to one set of poles; but the erection and maintenance by the defendant of the poles and wires complained of is not a substantial invasion of the plaintiffs prior license, and does not interfere with the right of the plaintiffs to properly maintain and operate their lines and transact their business, and as the poles were erected by direction of the proper authorities of the borough, defendant has the right to maintain them; *Joyce Electric Law*, Sec. 517. But in maintaining them every precaution should be taken not to interfere with or injure plaintiffs' lines, and as they are operating under a prior license the preliminary decree heretofore made directing the attaching of the wires to cross-arms on the defendant's poles and regulating their erection is reasonable and must be made perpetual.

The defendant alleges in its answer filed after the preliminary decree, that it "offered to protect plaintiffs wires by attaching them to cross-arms or allow them to do so, but was prevented by plaintiffs' action," and if this be the fact the plaintiffs should pay the costs. If the answer is responsive to the bill there is no evidence to overcome it and the facts would be found to be as stated therein; but the affidavit to the answer is made by the superintendent of the defendant company, who says therein "that the averments set forth in the foregoing answer are true and correct as he verily believes," and as he does not aver that he has personal knowledge of the alleged facts, the answer is merely part of the pleadings in the case and is not evidence: *Kane* v. *Fire Insurance Company (No. 1)*, 199 Pa. 198.

The only evidence on the subject is that of an officer of the defendant company who testified it never objected to plaintiffs fastening their wires to defendant's poles, and one of plaintiffs' witnesses who testified on cross examination that the matter might have been talked about. This evidence is not sufficient to sustain the averments in the answer and the costs must be placed on the defendant.

FINDINGS OF FACT.

1. The plaintiffs and defendant are corporations organized and existing under the laws of the commonwealth of Pennsylvania for the purpose of manufacturing and supplying electric current to the public in certain portions of Allegheny county, including the borough of East Pittsburgh.

2. The plaintiffs by virtue of an ordinance of said borough passed April 30, 1896, and their succession to the rights of the licensee therein named, are maintaining on Bessemer avenue in said borough poles and seven lines of wires attached thereto for the transmission of electricity for lighting purposes, four of said lines carrying 5,000 volts each, one 3,600 and two 1,100.

3. The councils of said borough on the 12th of February, 1906, passed an ordinance granting to the defendant company the right to erect poles along the streets of said borough and attach wires thereto for the transmission of electricity for light and other purposes, the company to "place the poles and other appliances along the streets and highways in such manner and location as the street committee or the borough engineer of the borough shall designate."

4. About May 1, 1906, the defendant erected three poles on Bessemer avenue, East Pittsburgh, between South Park street and Grandview avenue, on the same side of Bessemer avenue as the pole line and wires of the plaintiffs, in such manner that the

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poles of defendant pass between and extend above the wires of plaintiffs, and strung wires on these poles; and the defendant's poles were erected in close proximity to two poles of the plaintiffs, one of them being so close as to almost touch the pole of plaintiffs. These poles were erected in the locations designated by the engineer of said borough and when erected were within a few inches of plaintiffs high tension wires; but these wires are now attached to cross-arms on defendant's poles as required by the preliminary decree.

5. The defendant having attached plaintiffs' wires to cross-arms on the defendant's poles there is now no substantial invasion of the plaintiffs' rights under their prior license, and the maintenance by the defendant of its poles and wires does not interfere with the right of the plaintiffs to properly maintain and operate their lines and transact their business.

CONCLUSIONS OF LAW.

The plaintiffs do not have the exclusive right to erect and maintain poles and wires on Bessemer avenue, East Pittsburgh, and the defendant under the ordinance of said borough had the right to erect and maintain the poles and wires erected and constructed by it on said avenue; but every precaution should be taken by the defendant to prevent injury to the plaintiffs' poles and wires, and the preliminary decree made in this case must be made perpetual. The costs to be paid by the defendant.

Let a decree be drawn accordingly.

SAME v. SAME.

Sur exceptions.

Opinion by OVER, J. Filed January 12, 1907.

We still think that there is now no substantial invasion of the plaintiffs' rights under their prior license; but if there be it is by reason of the fact that their lines are weakened electrically on account of their attachment to the cross-arms on defendant's poles. The defendant, however, is willing to have its poles used as union poles for both plaintiffs' and defendant's wires, and if this were done the plaintiffs' poles could be removed and their lines would thus be stronger electrically. This method is authorized by the act of March 19, 1903, P. L. 34, and we suggest that it be adopted.

As none of the exceptions filed seem to be well taken they are all dismissed.

For plaintiffs, *Reed, Smith, Shaw & Beal.*

For defendant, *Stewart M. Cunningham.*

Court of Common Pleas,

WASHINGTON COUNTY.

RITCHIE v. STOCKDALE et al.

Equity—Specific performance.

A gave an option to B agreeing to sell the Pittsburgh or River Vein of coal and certain mining rights underlying his farm, "by a deed in fee simple clear of all liens and encumbrances," in which option A's wife did not join. B assigned the option, after it had become a binding contract to C. On May 27, 1903, C refused to accept A's deed without his wife joining in deed, unless a certain portion of the money was retained to protect him. A, at the time deed was offered, promised C his wife would join later and C still refusing to pay the full amount of the purchase money unless A's wife would join. A declared the deal off and offered C $100 for damages, which C refused. Two years afterwards C brought a bill for specific performance of A" contract. Held, A was required to perform his contract with C upon C paying to him the full amount of the purchase money.

No. 1547. In Equity. Adjudication.

Opinion PER CURIAM. Filed January 22, 1907.

The court, upon the testimony produced at the trial and from the admissions found in the pleadings, find the following facts, to wit:

1. Since the 12th day of November, 1898, up to the present date, H. S. Stockdale, one of the defendants, has held the legal title to a tract of land in Morris township containing one hundred seventy acres more or less, the evidence of his title being a deed from Jesse S. Booth and wife dated November 12, 1898, and recorded in recorder's office of Washington county, Pennsylvania, in deed book 272, at page 240.

2. On the 12th day of March, 1902, the said H. S. Stockdale gave to J. B. Hathaway a written option to purchase the Pittsburgh or river vein of coal in and underlying this tract of land at and for the price of thirty dollars per acre, said option to continue until the 12th day of May, 1902, a true copy of said written option being the same as exhibit "A" attached to the plaintiff's bill herein filed.

3. J. B. Hathaway on May 10, 1902, served notice on the said H. S. Stockdale that he elected to purchase said coal in and underlying said tract of land on the terms and conditions of and under said written option.

4. J. B. Hathaway, on the 26th day of

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August, 1902, assigned, transferred and set over to the plaintiff in this case, C. S. Ritchie, all his rights, title and interest in said coal in and underlying said tract of land held and owned by virtue and under said written option and acceptance.

5. Since May 10, 1902, when J. B. Hathaway elected to purchase said coal, he and his vendee, C. S. Ritchie, have always been ready, able and willing to perform the covenants entered into by the said J. B. Hathaway when he elected to purchase the same upon the terms and conditions of said option, upon the said H. S. Stockdale fully performing his covenants.

6. On the 27th day of May, 1903, H. S. Stockdale tendered to C. S. Ritchie a deed of conveyance for said tract of land executed by himself alone and demanded the payment of the purchase money, as provided for in said written option.

7. At that time and at the time the written option was executed, the said H. S. Stockdale had a wife, S. M. Stockdale, his co-defendant, who lived with him, and of this fact the said J. B. Hathaway and C. S. Ritchie had knowledge.

8. When the said H. S. Stockdale tendered his deed to C. S. Ritchie on the 27th day of May, 1903, he said to Ritchie that his wife was sick and unable to execute the deed when he did but that she would execute it later. C. S. Ritchie refused to accept the deed as tendered and pay the purchase money. Thereupon, H. S. Stockdale tendered C. S. Ritchie his check for one hundred dollars as damages for breach of his contract in tendering a deed in which his wife had not joined. C. S. Ritchie refused it and since that day and up to the filing of this bill has insisted on a deed executed by both H. S. Stockdale and S. M. Stockdale, his wife, unless one-third of the purchase money was allowed to remain charged upon said coal until the said S. M. Stockdale should join in the deed.

9. S. M. Stockdale never executed the written option in question and never agreed to execute a deed with her husband, under and in compliance with its terms, but has always refused to join him in the execution of a deed—her refusal appearing to be not collusive but first because she thought the coal was not optioned at an adequate price, and second because she claimed to have an equitable title in the property to be conveyed.

10. At the hearing the court intimating that no decree of specific performance could be made against S. M. Stockdale, the wife, the plaintiff with the leave of court amended his bill by adding an additional prayer as follows, to wit:

"That if the court shall find that a decree of specific performance by the defendant, S. M. Stockdale, cannot and should not be entered in this action, the court then order and decree that the defendant, H. S. Stockdale, specifically perform the terms of the contract mentioned and recited in said bill according to the true intent and meaning of said contract," so far as he could.

CONCLUSIONS OF LAW.

1. That the plaintiff is not entitled to specific performance against S. M. Stockdale and the bill as to her should be dismissed without prejudice to any right, title and interest that she may have in said coal.

2. That the plaintiff on his amended prayer is entitled to a decree of specific performance against H. S. Stockdale upon the payment to him of the full amount of the purchase money with interest, as provided in the written option, a copy of which is marked exhibit "A" and attached to the plaintiff's bill, so far as he is able to perform it.

3. That the costs of this proceeding be paid by C. S. Ritchie and H. S. Stockdale in equal proportions, each one-half thereof.

COMMENTS.

It is not denied that H. S. Stockdale optioned his coal in good faith to J. B. Hathaway and that J. B. Hathaway elected to become the purchaser thereof in good faith on the terms and conditions set out at the option. The option required H. S. Stockdale "to well and sufficiently convey in fee simple cleared of all liens and encumbrances, by deed of general warranty," the coal described therein. In his attempts to close the deal he made oral promises that his wife would join with him in conveying title to C. S. Ritchie. This gave C. S. Ritchie, as we view it, good grounds for believing that there might be collusion between the husband and wife in her refusal to execute the deed and justified him in refusing to accept H. S. Stockdale's deed, at least until the bona fides of her refusal were made manifest; and that this being the situation, H. S. Stockdale was not in position at any time before the plaintiff's bill was filed to declare the contract rescinded. And vendor by tendering performances *in full* of his covenants contained in a written contract to sell real estate may in a reason-

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able time thereafter rescind his contract if the vendee after notice fails to perform *his* covenants. But he cannot tender part performance and then in default of full performance on the part of the vendee declare the contract rescinded. In our opinion H. S. Stockdale was never in a position under the facts of this case as the testimony shows them to be, to rescind his contract, and if the plaintiff is now willing to accept performance so far as this court can decree it, he is entitled to such a decree: *Penn. Mining Co.* v. *Smith*, 210 Pa. 49.

The fact that the vendor covenanted to make a good and sufficient deed clear of liens and encumbrances; the fact that when he tendered a deed executed by himself alone he gave an excuse why his wife had been unable to execute it and promised that she would at some future time sign it, and the fact that he then offered (after the vendee refused to accept the deed without the wife's signature) to pay one hundred dollars as liquidated damages for violating his contract, fully justified the plaintiff in believing that the wife had been willing when the option was given to join her husband in the deed that would have to be made if the option was accepted and in refusing to pay all the purchase money for the vendor's deed until he should investigate whether there was collusion between the husband and wife to defeat the sale on the terms set out in the written contract and did not justify the rescission of the contract by the vendor.

There can be no doubt on the question that the wife in this case who did not sign and acknowledge the written option is under no obligation to execute and deliver a deed for this coal to the plaintiff; and it is equally clear that the plaintiff can pay all the purchase money and accept from the defendant H. S. Stockdale the best possible deed that he can give.

The cases of *Riesz's Appeal*, 73 Pa. 485; *Burk's Appeal*, 75 Pa. 141; *Harrigan's Appeal*, 1 Monaghan 450; *Graft* v. *Loucks*, 138 Pa. 453, and other cases that could be cited fully sustain this conclusion.

And now January 22, 1907, it is ordered that this adjudication be filed and if no exceptions are filed thereto sec. reg. a decree will be prepared in accordance with the conclusions of law in said adjudication set out.

For plaintiff, *John C. Bane, A. M. Templeton* and *H. R. Myers.*

For defendants, *Samuel Amspoker.*

[From Harry Russell Myers, Esq., Washington, Pa.]

Court of Common Pleas,

FAYETTE COUNTY.

ALBIG v. MORTON.

Landlord and tenant—Lease—Covenant against leasing—Waiver.

Although a lessor may waive a covenant against subletting without consent in writing by conduct in pais, yet such waiver will not extend to a further subletting by the sub-tenant without the lessor's consent in writing.

No. 168 September Term, 1905. Motion by defendant for judgment non obstante veredicto.

Opinion by UMBEL, J. Filed November 30, 1906.

Amanda Morton, the wife of the defendant, in August, 1903, was the owner in fee simple, inter alia, of "all that certain store room situate on North Pittsburg street, No. 221, in the borough of Connellsville, Fayette county, state of Pennsylvania"

August, 17, 1903, a lease was executed in duplicate "Between Amanda Morton of Connellsville, lessor, party of the first part, and W. J. Swinderman, of the city of Pittsburg, lessee, of the second part," leasing the said premises "for the purpose of a meat market from the tenth day of August, 1903, to the first day of April, 1904, with the privilege of renting the same for three years longer at $35 per month."

The lease held by Swinderman, and offered in evidence by the plaintiff as plaintiff's exhibit "A," is signed "A. B. Morton(Seal), W. J. Swinderman (Seal)," without attesting witness; the one by Amanda Morton, and offered in evidence by the defendant as defendant's exhibit No. 1, is signed "A. B. Morton, agent (Seal)," and witnessed by W. H. Myers.

The said lease provides, inter alia, that the lessee "will not assign this lease or under lease or let the said premises or any part thereof or interest therein to any person or persons without the consent of the said lessor had in writing . . . and on failure of the said lessee to . . . keep all the covenants of this lease . . . then the said lessee hereby authorizes and empowers any attorney of any court of record in Pennsylvania to appear in said court and confess a judgment in an amicable action of ejectment for the premises above described; and authorizes the immediate issuing of a writ of *hab. fa. pos.*," etc.

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Exhibit "A" is endorsed as follows: November 14, 1903, for value received I hereby assign and set over to J. E. Albig all my right, title, interest and claim in and to the within agreement," signed, W. J. Swinderman.

The parties to this asssgnment insist that while written consent of the lessor was not secured previous to its execution, such subletting did not operate to work a forfeiture because the defendant was consulted, was present and agreed to it, and as a further evidence, aver that the defendant received and accepted the rent from Albig, the assignee, after the said assignment was made, thus specifically waiving such condition; the defendant insists that he did not agree to such arrangement and that his understanding was that Swinderman was taking Albig in as a partner, to which he did not object. He admits having received the rent by checks made by Albig.

Again, without written consent or authority from the lessor, the said Albig, as party of the first part, on July 2, 1904, entered into an agreement with Albert H. Manheimer, as party of the second part, leasing to him "Until April 1, 1905, the business, goodwill, and the following described or enumerated articles, viz: one ice box, two counters, one butter box, two meat blocks, three sets scales, five meat racks, one cash register, one fireproof safe, one roll top desk, and other articles of furniture, fixtures, tools, etc., used in connection with the said retail meat business and now in use in the said store. . . . It is further understood and agreed that the party of the second part is to pay the rental for the uee of said room in which the business is now being conducted, as provided in the lease between said first party and the lessor."

This lease provided that Manheimer was to pay Albig a weekly rental of $15 per week for the first four weeks and $20 per week thereafter, but according to the testimony it was reduced to $12.50 per week.

Manheimer conducted the business under this agreement from July, 1904, until February, 1905, when he leased the said premises direct from the owner or her agent, the defendant herein, and refused longer to recognize and pay rent to Albig, the plaintiff, and refused to use Albig's, tools, etc., and put them out of the place and stored them in Adams, Davis & Dull's store rooms.

On these facts the plaintiff, on July 18, 1905, instituted this action in assumpsit and, quoting from the plaintiff's statement, "By reason whereof and by reason of the defendant's breach of the said contract as aforesaid and the default of the defendant in not keeping and observing the covenants in the said agreement contained, the defendant" (meaning, we presume, the plaintiff) "has suffered damages to the amount of $3,000."

On the trial of this case the testimony tended to establish the above facts, and by agreement of the parties a verdict was taken in favor of the plaintiff for the sum of $800, reserving the right to enter judgment non obstante veredicto for the defendant on the following points:

1. Whether the facts established operated to work a forfeiture of the said lease to the extent of warranting the lessor to rescind the lease and let the premises to another.

2. Title to the leased premises being in Amanda Morton, and she or her name appearing as the party of the first part in plaintiff's exhibit "A," although signed by the defendant in his individual capacity, and in defendant's exhibit No. 1 signed by the defendant as agent, can this action be maintained against the defendant; and if so should it not have been in trespass rather than in assumpsit?

3. Whether under all the evidence the plaintiff is entitled to recover.

As to the first question reserved, it is insisted by the plaintiff that he has shown that the lessor, by and through her agent, waived the written consent required by the lease before he could sublet; and not only that, but that the defendant, well knowing the facts and accepting the rent from Albig, is estopped from urging a forfeiture.

Granting the contention of the plaintiff in that regard—how about the leasing by the plaintiff to Manheimer in July, 1904? The plaintiff insists that this was not a subletting of the premises but was only a leasing of the business, goodwill, tools, etc., and that the title under the original lease as assigned to him by Swinderman remained in him, the said Albig. What are the facts in that regard?

Albig has been paying $35 per month for the primises and operating a meat market. He leases the business, goodwill, tools, etc., to Manheimer for $15 per week, increased to $20, then by subsequent arrangement reduced to $12.50 per week, providing in the same contract that his lessee, Manheimer, shall assume and pay to the owner of the premises the rent reserved in the original

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lease of $35 per month, and accordingly turns over the premises, business, etc., and he (Albig) resides in a distant town from the location of the premises and said business.

In law and in effect is there any difference in this condition than if Albig had taken the original lease and endorsed thereon another assignment including the business, goodwill, tools, etc., and making the rent reserved the same as provided in said lease, and adding the weekly amounts of $15, $20 or $12.50 as the case might be; or than if an entirely new lease had been prepared directly for the premises including the business, goodwill, tools, etc., for the rental of about $85 to $115 per month? We think not, and in our opinion they unquestionably amount to a subletting, and operate to work a forfeiture of the said lease.

Further, however, it is contended on the part of the plaintiff that even if such should operate as a forfeiture, it was the duty of the lessor to pursue strictly the remedy to recover possession provided in the original lease, viz: on "a judgment in an amicable action of ejection for the premises" and "issuing a writ of *hab. fa. pos.*," the sole and only purpose of which is the recovery of possession by the lessor.

Albig was not in possession, and by his own showing at that time he had in himself no right of possession. The man who was in possession under Albig reconized the forfeiture, and did surrender legal if not actual possession to the lessor. Hence, there is no necessity of incurring the expense incident to pursuing the remedy provided in the lease when the same purpose was accomplished amicably otherwise. Manheimer and not the defendant removed and stored the plaintiff's tools, and we do not understand that the defendant could be held liable for Manheimer's acts, with which he had no connection.

In view of which we are of opinion that the plaintiff has no right of action against the defendant, and that judgment should be entered accordingly in favor of the defendant.

Our conclusion of the first question reserved determines also the third, and makes unnecessary a discussion and determination of the second.

ORDER.

Now, July 11, 1906, this matter came on to be heard and was argued; and now, Nov. 30, 1906, upon and after due consideration and for the reasons set forth in the opinion herewith, it is ordered and directed that the first and third points reserved be and the same are hereby determined in favor of the defendant, the motion of the defendant for judgment in his favor on the points reserved be and the same is hereby sustained, and judgment is directed to be entered accordingly in favor of the defendant and against the plaintiff, non obstante veredicto, on payment of the jury fee.

For plaintiff, *Sterling, Higbee, Dumbauld & Brown.*

For defendant, *Campbell, Howard & Patterson.*

[From D. W. McDonald, Esq., Uniontown, Pa.]

In Memoriam.

DAVID D. BRUCE, Esq.

A meeting of the members of the Allegheny County Bar was held at the rooms of the Bar Association on Wednesday, January 30, 1907, to take suitable action on the death of DAVID D. BRUCE, ESQ.

President—Hon. John M. Kennedy.

Vice Presidents—Hon. W. G. Hawkins, Hon. James S. Young, Hon. Jas. R. Macfarlane, Geo. H. Christy, Esq., Hon. Christopher Magee, Hon. John Dalzell, Hon. Samuel A. McClung, Hon. R. S. Frazer.

Committee on Resolutions—Hon. Geo. W. Guthrie, Sol. Schoyer, Esq., J. M. Shields, Esq., D. T. Watson, Esq., W. B. Rodgers, Esq., T. C. Lazear, Esq., Hon. A. M. Brown.

Secretaries—Allan B. Angney, Esq., J. H. Harrison, Esq., U. G. Vogan, Esq., W. K. Shiras, Esq.

The Committee on Resolutions reported the following minute, which was unanimously adopted:

Mr. Chairman and Gentlemen of the Bar:

DAVID DUNCAN BRUCE was born on the 3rd day of March, 1823, and died on the 25th day of January, 1907, at 12:45 P. M., thus almost completing his eighty-fourth year. His father, Dr. Robert Bruce, the first Chancellor of the Western University of Pennsylvania, came to America from Scotland in the year 1806, locating in Pittsburgh in 1808.

All his life Mr. Bruce lived in the city of Pittsburgh. He was educated at the Western University of Pennsylvania; studied law under the late John E. Mahon, Esq., and was admitted to the Bar of Allegheny county on the 2nd day of March, 1846, over sixty

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years ago. He was at the time of his death the oldest living member of the Bar excepting one, Judge Mellon. Mr. Bruce's first office was on Fifth avenue below Smithfield street, and afterwards at the corner of Fifth avenue and Grant street, at which latter place he remained until he ceased practicing law in 1893. In 1857 he formed a partnership with his late brother-in-law, William B. Negley, Esq., which partnership continued until March, 1883, when Mr. J. M. Shields was admitted to the firm, which then continued under the name of Bruce, Negley & Shields until November 1, 1886, at which date Mr. Negley withdrew and the firm then continued as Bruce & Shields until the first of January, 1893, when Mr. Bruce retired from practice.

He married in 1847, his wife dying in 1898, one year after the celebration of the fiftieth anniversary of their marriage. Of his five children only one, Mrs. Lillian B. Ayers, of Kittanning, Pa., survives.

As a lawyer, Mr. Bruce was particularly well fitted for the trial of cases. He was a good judge of men and had tact and skill in the examination and cross-examination of witnesses and in his address to the jury. He was efficient, honest and able in the practice of his profession in all its branches, and not infrequently the courts of original jurisdiction, as well as the grave judges of the Supreme Court, were convulsed with laughter at some humorous sally of his. He believed in the persuasion of a judge rather than in forcing his conclusion by a closely connected logical argument. His mode of presentation was ingenious and plaintive, trying, as it were, to coax the judge on his side of the controversy and to take his views of the question discussed. He was humorous, sarcastic and pathetic as it were to suit the various phases of the case and moods of the judge; but he was always original. His practice was large and remunerative.

As a friend and in his many social relations, he was full of the milk of human kindness; amusing, delightfully friendly, he was a most charming companion. He was the soul of a dinner. At any gathering of the members of the bar he invariably enlivened the time by some humorous tale well told, and almost invariably merry shouts of laughter from some corner of the room told where Bruce was.

He was strictly honorable, honest and high-toned both in his professional and private life. No one who knew him ever doubted his sincerity and good faith, and he maintained until the end a confirmed belief that his profession was to be respected and upheld and practiced as a science and not used as a business or solely for the accumulation of wealth.

As a citizen, he became specially interested in municipal government, and at quite an advanced age became a member of council and spent very much time on the affairs of the city. He was one of the most efficient men in working out the settlement of what was known as the liens arising under the Penn Avenue Act, and he worked assiduously for and to a considerable extent moulded the laws for the government of our cities.

He was a reader and a thinker on lines other than his profession.

He loved astronomy and constantly read on that subject. The vastness of the universe, its seeming complexity and yet simplicity, and its wonders and extent attracted him. The story of stars gleaned by telescope, spectroscope and photography delighted him, and even when death came the mysteries of Mars enthralled him.

Then, too, he was a student in theology. He was well-read in both the Old and the New Testament, in the Talmud and ancient beliefs. More than one essay was written by him on different discussed and debated theological questions. This was true especially in reference to the general outline and system and coherence of the Christian religion

He was in touch with nature in all its various moods and manifestations: he loved flowers, their odor and their form attratcted him; he loved animals and studied them; he delighted in birds, and would for hours with a field-glass, watch and study their movements.

Indeed, it may be truly said that he was not only a lover of his race, but of all animal and vegetable life, and that he acted upon and was re-acted upon by what has been called all these manifestations of the thoughts of God.

He was a successful lawyer; an effective, persuasive advocate; an enduring, honest friend; a charming conversationalist; a bright, witty, genial humorist; an honorable man who loved mercy and did justice.

He has done his share towards that far-off, divine event which faith believes in and prophets foretell, and when his natural strength abated and his powers weakened, he went back to the power that gave him life.

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N. S. Vol. XXXVII. O. S. Vol. LIV. } No. 31.

PITTSBURGH, PA., FEBRUARY 13, 1907.

Orphans' Court,

ALLEGHENY COUNTY.

In re Estate of JOHN FLEMING, Deceased.

Power of election as assets.

A defaulting trustee may not withhold means of payment which he has in his control; and hence may be attached for refusal to exercise power of election in favor of his cestui que trust.

No. 116 September Term, 1904.

HAWKINS, P. J.

STATEMENT.

The real question in this case is whether or not a power of election to take under the intestate law is assets for the discharge of trust liabilities.

In order to an understanding of the moral aspects of the question, it is necessary to trace respondent's relation to the case. John Fleming died in 1870 leaving a will in which inter alia he gave $20,000 to his brother, Cochran Fleming, in trust to pay the income to James P. Fleming for life and then the principal to the latter's children; and the residue of his estate consisting of a large drug business to said Cochran Fleming. Cochran Fleming became the acting executor here, and took out ancillary letters in Louisiana where a branch drug business had been carried on under the charge of James P. Fleming. Shortly after John's death Cochran Fleming, on going to Louisiana to look after the assets, filed an inventory showing $79,813.29 from an invoice and balance sheet taken before John's death; but found that James P., who was of known irresponsibility, had disposed of everthing except a few patent medicines. On the advice of a firm of young lawyers whom John had recommended he took out a policy of insurance on his brother Jame's life for $20,000 to secure the "reversion" of his legacy "as the best thing" that could be done. Two years afterward (1872) Mr. Fleming again went to Louisiana and finding that his brother was not paying the premiums on the insurance sought other means of protection. He found that James who had an attack of delirium tremens was interested with a Dr. Patterson in business and fixed up an arrangement "by which James would sell out his interest in that business to Dr. Patterson, and Dr. Patterson would sell to James his interest in certain Louisiana lands. "I got that arranged" testified Mr. Fleming. "Dr. Patterson was to pay the difference for the interest, in money or its equivalent, which amounted to some $16,000 or $17,000. I got that transfer made and all straightened up; and then I cancelled the life insurance policy and took a mortgage on the properties that James P. Fleming then held; . . . but at the time I took that mortgage they could'nt have sold the whole business for $5,000; but I just made up my mind that if James lived to be fifty or sixty or seventy years old the real estate in Louisiana would enhance in value enough to more than cover the security and I would be all right. I took that chance; there was nothing else to do, and I took that chance on the advice of my lawyers, Hudson & Hern. I gave him $16,000 or whatever it was with the understanding that he would go up into this land that I had secured for him and build a sawmill for the cypress timber and build up a business. He had ample money, lots of money, much more than was needed for that purpose of building up a business and taking care of this land. Then I got him started—started him, as I supposed, for the cypress timber land; and he was going to build this mill. Instead of going to the cypress timber land, he never stopped until he got to San Antonio, Texas, ... and he never moved out of San Antonio until he had spent every cent of his money." The properties mortgaged were a house and lot in New Orleans and six thousand acres of cypress timber land. James, having failed to pay the taxes, the New Orleans property was sold, and was redeemed by Cochran Fleming who paid the

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taxes for a while, then ceased, and the whole property was again sold. In the meantime James P. Fleming conveyed his title to Cochran. No effort has been made to redeem it, assuming that possible.

When Cochran Fleming was asked at the audit of his account in 1904 why he did not get the Louisiana property back from James P. he answered "I was'nt hunting it; I had made up my mind that I could afford to give him that whole business; I let him take it; he had it; let him keep it." The reason which he gave as leading him to this course of conduct was that because his brother John had said he wished to make some change in his will; he "figured out" that he intended to give James P. the Louisiana business or part of it. The residuary estate was then ample to pay this legacy; but Mr. Fleming having afterward become insolvent without making any provision for the security of this legacy was surcharged with, and ordered to pay the amount; and on failure to pay a rule for attachment issued, on the hearing of which it appearing that he had nothing but deeds for the Louisiana lands and was willing to transfer these, the proceeding was discontinued. No transfer of these lands seems to have been made or tendered; and if they had been, no claim is made that their value is equal to the amount of the legacy.

After the date of this proceeding in attachment Cochran Fleming's wife died, leaving a will by which she gave her estate of $55,000 in trust to pay him the net income free from claims of his creditors, and when he was asked to give this petititioner the benefit of refusal to take under the will, he declined. In the meantime James P. Fleming had died. Hence the present proceeding.

Counsel for respondent claims that the transactions between these parties in the former proceedings for attachment "are in fact the same as if Cochran Fleming had been actually attached and had been discharged with consent of the petitioners," and hence has presumptively purged himself of contempt.

It is said on behalf of Mr. Fleming that he is nearly eighty years of age, with impaired hearing, and this provision made by his wife is his only means of support; but on the other hand, it is said that petitioners have their aged mother, and one of them a family to support, and are in straightened circumstances.

OPINION. Filed January 15, 1907.

There is no merit in respondent's suggestion that the power of this court was exhausted by the first proceeding for attachment. That proceeding went only so far as to raise the question of whether or not an attachment should issue, and was then abandoned. There was no adjudication of contempt, and therefore no exhaustion of power. But assume that there had been an adjudication and arrest, the suggested conclusion will not follow; for attachment is a well recognized means, not of mere punishment for contempt but of enforcing civil remedies in courts of equity: *Tomes' Appeal*, 50 Pa. 285. "Imprisonment for disobedience to the process of the court," said Paxon, C. J., in *Com.* v. *Perkins*, 124 Pa. 48, " is not so much for punishment as to enforce such decree, and ceases the moment respondent purges himself of his contempt for disobedience." Such was the law before the passage of the act of 1842 abolishing imprisonment for debt and that act excepted out of its operation cases of this class: *Chew's Appeal*, 44 Pa. 247. It is clearly distinguishable from cases arising under the act of June 16, 1836, which provides for punishment of contempts committed in open court; while this is provided as a means of enforcing obedience to administrative decrees: *Tomes' Appeal*, supra. So the argument founded on supposed analogy to a *ca. sa.*, overlooks the difference between the common law rules governing execution in *rem.*, and the statutory power of the Orphans' Court given to enforce obedience to its decrees. The latter is much wider in its reach and more comprehensive in its purpose, requiring a greater liberality in its interpretation. An order to deliver all effects cannot be satisfied as mere execution process can be by a sale of property. It may be a just privilege of the debtor to demand that his property seized in execution shall be first applied to his debt, before he shall be called on to satisfy it with his person. But where his default is not only that of a debtor, but that of an

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offender against authority, he stands in a different relation. There, if we examine the statute, we discover a purpose which requires more enlarged power in the tribunal administering this branch of the law. The principle upon which the court goes is to replace the parties in the same situation as though no breach of trust had been committed, and for this purpose will restore trust property which can be identified, and decree compensation for that which cant be followed: *Hill on Trustees*, 52. . It necessarily follows that every known civil remedy—execution, sequestration, attachment—may be used as often as exigency may require, and every asset of the refractory trustee be made available for this purpose. This being a court of equity the choice, and time of use, of remedy lies in its discretion: *Tomes' Appeal*, supra.

The decree in the present case being founded on respondent's fraudulent conversion of the trust funds, his refusal to make reparation calls for appropriate remedy. The ordinary process would be useless because it can only operate in *rem.*, and aside from the alleged Louisiana property there is nothing to which it can attach. It is only therefore by constraint of the trustee's person that any relief if at all can be afforded, and attachment which lies in *personam*, is the appropriate process: *Chess' Appeal*; *Tomes' Appeal*, supra. The controversy is then narrowed down to the single question whether or not this refractory trustee, who has the means of payment in his power, may avoid arrest by pleading personal privilege? No one will deny that in the administration of this estate respondent was bound to use every available means for the recovery of assets due the decedent. Debts due by the executor himself are presumed to have been paid because the hand which ought to pay is the hand which ought to receive. It is his duty to recover assets pledged to his surety as indemnity: *Brooke's Appeal*, 102 Pa. 150. He may be compelled to transfer assets to himself as tenant for life in order to secure those in remainder: *Van Dusen's Appeal*, 102 Pa. 224. And so he may be held under arrest until he discovers assets which he conceals: *Tomes' Appeal*, supra, or produces those which he has deposited in a foreign bank. Even under the act of 1842, in cases where the debtor is *prima facie* not liable to imprisonment, if he "unjustly refuses to apply to the payment of a judgment" his money or other property, he is liable to arrest and imprisonment until duly discharged by law: *Tomes' Appeal*, supra; but much more should he be constrained to make reparation where as here he has been guilty of fraudulent conversion of funds which had come into his hands under an express trust. The loss of trust funds is wholly owing to respondent's malfeasance; and the injury was all the more culpable because his *cestius que trustent* were by reason of minority incompetent to take care of their interests. His moral obligation to make reparation is plain: *Snell's Eq.*, 38; he has the means in his power of doing so; and what he ought in good conscience, he should be constrained, to do. Even corporate officers are said to be under moral obligation to call in subscriptions when necessary to satisfy the demands of creditors. "It is not discretionary with them to say whether the creditors of the corporation shall be paid or not when they have the means at command: *R. R.* v. *Fitler*, 60 Pa. 124.

The suggestion of analogy between that class of cases in which the courts refuse to treat a power as assets, and this, has no merit because in the former there can be no title to which execution can attach until the exercise of the power: *Gilman* v. *Bell*, 99 Ill. 144, while here the surviving husband had title the moment his wife died: *Watterson's Appeal*, 95 Pa. 313; *Jackson's Appeal*, 126 Id. 105. Assuming he has made a formal acceptance under the will, it must be regarded as a breach of duty and he stands in the position of one who has made a fraudulent conveyance within the constraining power of the court. The manner of acquisition of the fund is immaterial to the question raised. If respondent had earned the fund by his own labor and placed it in the hands of another with intent to hinder and delay these petitioners, no one would doubt this court's power of constraint. The situation here is practically the same; the trustee has the means of paying and must use them in accordance with his duty. Mere selfish purposes must yield to prior trust obligations.

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The court therefore finds that respondent's power of election to take his share as surviving husband under the intestate law in his deceased wife's estate is an asset available for the discharge of his trust liability under the decree made in the estate of John Fleming, deceased.

For petitioners, *Over & Adair.*

For respondent, *J. M. Swearingen.*

Court of Common Pleas,

WASHINGTON COUNTY.

BOROUGH OF WASHINGTON v. WESTERN UNION TELEGRAPH COMPANY.

Municipal corporations—Telegraph companies. Poles—License fee—Reasonableness of—Act of April 17, 1905, P. L. 183.

The right of a municipal corporation to charge a license fee as a police regulation upon poles erected in the borough of telegraph, electric light and other companies is unquestioned, but the fee charged must be reasonable and must not be collected and used for the purpose of revenue but as a means of defraying the cost of inspection only. Where it appears that in the past the fee was collected and turned into the borough treasury and used as revenue and no inspection made by the borough, the company, in an action to collect the fee due, can set off the amount so collected and used against the present indebtedness.

No. 109 November Term, 1906.

Opinion by TAYLOR, J. Filed January 21, 1907.

The counsel of the borough of Washington on the 8th day of May, 1899, ordained and enacted an ordinance as follows: "An ordinance providing for the collection of a license tax on telegraph, telephone and other poles in the borough of Washington and providing for the inspection of the same.

"Sec. 1. Be it enacted by the town counsel of the borough of Washington, in the county of Washington and state of Pennsylvania, and it is hereby enacted by the authority of the same, That from and after the passage of this ordinance all telegraph, telephone, electric light, electric power, heating, street car companies, and all other persons, companies and corporations, owning, erecting, maintaining, using or permitting to stand upon the streets or alleys of said borough any pole or poles, shall pay to the treasurer of said borough an annual license fee of fifty cents for each pole so owned, erected, maintained, used or permitted to stand upon said streets and alleys.

"Sec. 2. That any person, company or corporation, having poles erected, maintained, used or permitted to stand upon said streets or alleys, renting such poles, or allowing the use thereof by any other person, company or corporation, shall pay to the treasurer of said borough fifty cents per pole per annum additional for each and every person, company or corporation, renting or using such pole or poles. "On all poles erected within said borough between the first day of May and the first day of November one-half the license fee provided by this ordiance shall be paid for the year in which they are erected.

"Sec. 3. That it shall be the duty of every person, company or corporation, having poles erected upon the streets or alleys of said borough to distinctly mark the same in white letters not less than one inch in height, on black ground, with the name or initial of such person or company, corporation and to keep said marking constantly in good legible condition.

"Sec. 4. That it shall be the duty of every person, company or corporation having poles erected upon the streets or alleys of said borough annually on the first day of May to make application in writing to the treasurer of the borough for license to maintain poles within the borough, stating the number of poles to be maintained on each street and alley and also the number of poles rented to or used by any other person, company or corporation, together with the names of the persons, company or corporation renting or using the same.

"Sec. 5. The license year under this ordinance shall begin on the first day of May and end April 30 following, and the license fees prescribed herein shall be due and payable during the month of May and if not so paid they shall become delinquent on the first day of June. After becoming delinquent a penalty of ten per cent shall be added to and collected with said license fees. On receipt of the license fees the treasurer shall issue to the person, company or corporation

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paying the same, a license for the number of poles for which the fees have been paid, which license shall expire on April 30 following the date of its issue.

"Sec. 6. That it shall be the duty of the police of said borough to carefully inspect all poles erected in the streets and alleys of the borough, at least once in each month, and promptly report to the chief burgess any poles not found to be in safe condition. The chief of police shall make a semi-annual report in writing, to the borough counsel, at the regular monthly meetings in May and November, of the number of poles on the streets and alleys of the borough, giving the number of poles on each street and alley and the name of the persons, companys or corporations owning the same and the number owned by each, and also reporting the number and location of all poles in bad condition, together with the number and location of all poles not marked as required by the third section of this ordinance.

"Sec. 7. That every person, company or corporation neglecting or refusing to comply with the provisions of the third section of this ordinance shall forfeit and pay to the treasurer of said borough a penalty of one dollar per pole for each and every pole not marked as required by said third section. Provided, that before any action is brought for said penalty, ten days' notice in writing shall be given by the chief of police to the person, company or corporation in default, to comply with the provisions of the said third section. And in case such poles be not properly marked within ten days' after service of notice so to do, the corporate authorities of the borough may cause the same to be done and collect the cost thereof in addition to the penalty imposed by this section from the owner or owners of the poles so marked.

"Sec. 8. That every person, company or corporation neglecting or refusing to make application for license as required by the fourth section of this ordinance, for a period of ten days, shall forfeit and pay to the treasurer of said borough a penalty of one dollar per pole for each and every pole owned, maintained or kept standing on the streets or alleys of the borough by the person, company or corporation in default.

"Sec. 9. That the license fees and penalties required by this ordinance shall be collected as debts of like amount are by law collectible.

"Sec. 10. That all ordinances inconsistent herewith or supplied hereby be and the same are hereby repealed."

This ordinance was duly approved by the chief burgess of Washington on the eleventh day of May, 1899.

The right of the municipal authorities to pass this ordinance as a police regulation is too well settled to admit of discussion. "The introduction and construction of telegraph, telephone, electric light, electric power and streetcar lines through, over and upon the streets of a municipality, the erection of poles and stringing wires thereon charged with dangerous agencies as motive power calls for the exercise of more than ordinary care where several companies occupy the same streets with their poles and wires, not only in the erection of the poles and proper adjustment of the wires and cables, but in the maintenance and repair of the same, *and a vigilant and constant inspection. And every municipality owes the duty of rigid inspection to its citizens.* In the performance of this duty the proper authorities of the borough of Washington had a right to pass the ordinance above quoted, and neglect on their part to have done so would have been neglect of proper duty. This much is doubtless conceded by the petitioner in this case, who comes into the common pleas under the provisions of an act of assembly of April 17, 1905, P. L. 183, not questioning the power of council to pass such an ordinance under the authority of the police powers vested in it, but averring in its said petition that a dispute has existed between the petitioner and said borough of Washington at and prior to the first day of May, 1906, and ever since, as to whether or not the amount of the license fee named in the ordinance of said borough is reasonable, further averring, that in fact the said license fee is not reasonable, but "is in effect an ordinance for revenue and not a proper exercise of the police powers of the said borough in any respect, and that the charges and penalties provided for in said ordinance indicate that the purpose is not to compensate the said borough

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for any reasonable police regulation, but to afford a source of revenue to the said borough beyond its reasonable and proper rights and claims."

The answer of the borough to this citation is, that the amount of the license fee imposed by said ordinance is reasonable and is a reasonable and proper exercise of the police powers of the borough and that it is not an ordinance for revenue, nor was it ever disputed by the petitioner until October 5, 1906, and that the petitioner paid, without objection to the reasonableness of said license fee imposed by the said ordinance, for the years 1901, 1902, 1903, 1904 and 1905.

To this answer of the borough the petitioner filed the following replication, to wit:

"The replication of the Western Union Telegraph Company to the answer filed in the above entitled cause by the borough of Washington respectively represents:

"This respondent, it is true, has heretofore paid the license fees demanded of it by the borough of Washington, but it made such payments not because it was satisfied therewith, nor because it believed the same to be just and reasonable, but because the amounts demanded from year to year were comparatively small and the legal rights of the respective parties in such matters had not been fully settled and determined, and because no convenient tribunal had been established by law to settle and determine what charge might be lawfully made by boroughs in such cases against telegraph companies in such cases. In the meantime, however, the Supreme Court of the United States, in various cases, had determined that boroughs could not impose a tax or license fee for revenue, but only a tax for license fees sufficient to compensate them for the expense of reasonable inspection, and in the meantime the legislature of the state of Pennsylvania had enacted the act of assembly referred to in the petition in this case, entitled an act providing for the determination by the court of common pleas of the proper county of all disputes as to the reasonableness of the amount of license fees between municipal corporations and telegraph, telephone or light or power companies, approved April 17, 1905, P. L. 183, giving reasonable opportunity to the petitioner in this case, and others in like cases, to have determined the amount of annual license fee which it should pay to the borough of Washington in order to properly compensate it for the necessary costs of the services performed or to be performed by it for the inspection and regulation of the poles, etc., of the said telegraph company.

"And the said telegraph company further says that it is advised and believes that it is wholly immaterial in this case whether or not it has heretofore paid without objection the license fees demanded by the said borough of Washington, and the sole and only question is whether the amount now demanded is just and reasonable, according to law. And the said telegraph company further says that the amount now demanded from it by the said borough of Washington, which remains unpaid, is in dispute because of the facts alleged in the petitition filed in this case."

The testimony taken at the hearing related to the sole and only question whether the amount now demanded by the borough under said ordinance is just and reasonable, according to law.

It is decided by our courts that the determination of the reasonableness of the amount of the license fee to be charged lies in the discretion of the borough authorities in the first instance, and the authorities also hold that the court will not declare ordinances void unless unreasonableness is so apparent as to demonstrate abuse of this discretion. *Borough N. Braddock* v. *C. D. & P. Tel. Co.*, 11 Sup. Ct. 24; *New Hope Boro* v. *W. U. Telegraph Co.*, 202 Pa. 532.

It is also well settled by the authorities that the borough may not fix a license fee for the purpose of raising revenue, or collect a license fee fixed by ordinance on poles erected within the borough to defray the costs of inspection when the borough authorities are shown to have made no inspection of the poles within the time fixed for which the license is required to be paid. The elements which enter into the charge are the necessary or probable expense incident to the issuing of the license and the probable expense of such inspection, regulation and police surveillance as municipal authorities may law-

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fully give to the erection and maintenance of poles and wires. *Taylor Bros.* v. *Postal Tel. Co.*, 202 Pa. 583; *Schellsburg* v. *W. U. Tel. Co.*, 26 Sup. Ct. 343; *Norwood Boro* v. *W. U. Tel. Co.*, 25 Sup. Ct. 406.

In this latter case Rice, P. J., says: "In an action against a telegraph company to recover a license tax on telegraph poles and wires, the company may show that the municipality has made no inspection, and has neither paid out any money nor incurred any expense for that purpose and that the fee is grossly disproportionate to the amount of any expense that might have been reasonable and fairly incurred for the most careful, thorough and efficient inspection and supervision possible, and for all measures and precautions that could be required to be taken by the municipality for the safety of its citizens and the property."

In *Postal Tel. Co.* v. *Taylor*, 192 U. S. 64, it has been authoritively decided, "That it is competent for the defendant (an interstate telegraph company such as the petitioner in the present case is shown to be) in such action to show that the municipality has made no inspection and has neither paid out any money nor incurred any expense for that purpose, nor for providing the municipality with a fund to indemnify it against damage for which it might be held liable by reason of the negligent construction and maintenance of the telegraph line in advance of its happening, but it is simply one of the reasons for an inspection by the borough, which shall be most carefully and continuously performed in order that injuries may not arise from the neglect of such supervision."

In the case now before us for disposal there is shown by the evidence to be about 120 poles of the petitioners in the borough of Washington for which the ordinance imposes a license fee of 50 cents per pole and provides for a monthly inspection by the chief of police. The evidence is uncontradicted and from the petitioners, that a full and proper inspection of all of said poles within the borough can be made by one competent person in two days time at the cost of about $2.50 per day, amounting to $5.00 for each monthly inspection. In view of the extent to which there has been introduced and constructed in the said borough up to the present time, telegraph, telephone, electric light, electric power and street car lines, over and upon the streets, the erection of poles and stringing of wires thereon charged with dangerous agencies thereby increasing danger to the citizens and the property, the necessity is thereby made apparent for the utmost vigilance by the frequent inspection of poles to note natural decay and unilateral tension as well as safety of cross-arms and uncrossed wires. The monthly inspection thus found to be not unreasonable at a cost to the borough of sixty ($60) dollars per annum would be the actual expense of such inspection, or a trifle more per pole than is actually charged the petitioner by the ordinance.

The evidence in the case is uncontradicted that the borough has not made the monthly inspections called for in the ordinance and that the money collected from the petitioner, the Western Union Telegraph Company, has not been expended in whole for inspections, as provided in said ordinance, but illegally paid into the general treasury of the borough and used for purposes in no sense connected with its licensing and supervising and inspection powers under said ordinance. The suit instituted against the petitioner by the said borough for the collection of the license fees and penalty, undetermined at the date of the presentation of this petition, having been staid by order of court pending the determination of the questions raised by this proceeding, this stay will not be left and the petitioner allowed to reduce pro tanto the said borough's claim on showing by way of defense thereto that the said borough has not made the inspection at the actual cost to it in the amount sued for.

We doubt the constitutionality of the act under which this proceeding is had, and in finding that the ordinance is not unreasonable in the amount of the license fee of 50 cents per pole, nor the number of inspections fixed by said ordinance more than are necessary for safety under the circumstances as shown by the evidence, we found it unnecessary to pass the question at this time.

And now, January 21, 1907, this cause came on to be heard at a time agreed upon by the parties and fixed by the court, on the petition, answer and testimony taken after replication filed, and was argued by

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counsel, whereupon, upon due consideration, the petition is dismissed at the cost of the petitioner, and the stay of proceeding heretofore made by the court in the suit of said borough of Washington against said Western Union Telegraph Company, before the justice of the peace, for the collection of said license fees and penalty, as therein sued for, is lifted without prejudice to the right of the defendant in said suit to introduce by way of competent evidence before said justice of the peace, by way of defense, and pro tanto to the claim of the said borough to the charges made for which there was no inspection of the company's poles under said ordinance, as well as any other matter of defense authorized by law.

For plaintiff, *J. P. Miller* and *J. P. Miller, Jr.*

For defendant, *Donnan, Bronson & Miller.*

[From Harry Russell Myers, Esq., Washington, Pa.]

MUNICIPAL CORPORATIONS. In Wheeler v. City of Foat Dodge, 108 Northwestern Reporter, 1057, the Iowa court holds that the stretching of a wire from the roof of a buildihg downward and outward acroes a street, and ending at a pole to which it is fastened, though stretched pursuant to the consent of the municipality, and though through most of its course it is high above the heads of people using the walks and carriageways, is a nuisance, because an obstruction of the street, the right of the public to the street extending indefinitely ubward. In this case the wire had been stretched for the purpose of an acrobatic performance, and a pedestrian walking along the street was injured by the performer on the wire falling and astriking such pedestrian. The city was held liable for the injury.

The power of courts to enjoin the commission of a crime where property rights are involved is upheld in Ex parte Allison (Tex. Crim. App.) 3 L.R.A. (N.S.) 622.

A street car company which has so overcrowed a car that passengers are compelled to stand upon the steps and platform is held, in Alton Light & T. Co. v. Oller (Ill.) 4 L.R.A. (N.S.) 399, to be bound to regulate the speed of the car so as not to endanger persons so situated.

An Amateur.

The Chicago drummer who was arrested for assaulting the landlord of a South Dakota hotel found that there was only one lawyer in the village, and that he had already been retained by the plaintiff. In this emergency he demurred to being tried, as he was not lawyer enough to plead his own case, but the justice of the peace calmly replied:

"This court will see that you have all your rights. Anybody seen Jim Peters around here?"

"He's outdoors," answered someone.

"Then call him in."

Jim turned out to be a long and lathy farmer's hired man, and not at all bright looking, and as he entered the room his Honor queried:

"Jim, which end of the cow gets up first?"

"The hinder end, sir."

"And a horse?"

"The fronter end."

"All right. This drummer has given Joe Harris a black eye and wants a lawyer to prove that Joe ran ag'in the door casing and blacked it himself. I'll app'int you as his counsel."

"But I'm no lawyer."

"But you've got common sense, as you've just proved, and that's better yet. Go right ahead."

Jim went ahead, and in ten minutes he had the other side so tangled up that his Honor laid his spectacles aside and said:

"No use to go any further. There may have been a row, and probably there was a row, but Jim is getting ready to prove that the landlord was out in the barn and the drummer across the street, and there's no use taking up the time of this court. I'll divide the costs, and the parties had better shake hands, while, as for Jim Peters, he's a rising star that will continue to rise until it won't be considered no crime around here to jump another man's claim."—*Fargo Forum.*

The power of an attorney, under his general authority, to discontinue an action by a dismissal without prejudice, is sustained in Bacon v. Mitchell (N. D.) 4 L.R.A. (N.S.) 244, and his client is held to be bound thereby.

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PITTSBURGH, PA., FEBRUARY 20, 1907.

Court of Common Pleas No. 2,

ALLEGHENY COUNTY.

ARMSTRONG v. ALLEGHENY VALLEY STREET RY. CO.

Street railway—Right to construct tracks—County road—Verbal agreement with property owner.

Agents of defendant, a street railway company, called on plaintiff to obtain a right of way along a public road. Plaintiff stated she had no objection and all she wanted was her proper damage but refused to sign a written agreement. Work was commenced, and the damages not not being agreed upon, a bill in equity was filed to restrain further work.

Held, that while no written consent had been given defendant proceeded, relying on the verbal permission, and had spent large sums of money, and an injunction should be refused on defendant's filing a bond to secure plaintiff's damages.

No. 463 July Term, 1906.

Opinion by FRAZER, P. J. Filed August 8, 1906.

The purpose of this bill was to restrain defendant from constructing a street railway line upon and along the Pittsburgh and Freeport road where the same passes through property of plaintiff. From the bill, answer and proofs we find the following facts:

FINDINGS OF FACT.

1. Plaintiff is the owner of nine acres of land situate in Harmar township upon which she resides with her family. The Pittsburgh and Freeport public road runs through her property for a distance of 360 feet.

2. Defendant is a corporation created under the laws of this commonwealth by the merger and consolidation of the O'Hara Street Railway Company, the Harmar Street Railway Company and the Tarentum Traction Passenger Railway Company. The purpose of the company is to construct, maintain and operate a street railway through portions of the counties of Allegheny and Westmoreland, thereby connecting that district with the cities of Pittsburgh and Allegheny, and in so doing propose to use a portion of the public road known as the Pittsburgh and Freeport road.

3. The public road known as the Pittsburgh and Freeport road was laid out and opened in the year 1806, re-located in 1838, and has been since that latter date continuously used as a highway by the public in its present location.

4. About October 12, 1905, agents of defendant called at the residence of plaintiff and informed both her and her husband of the incorporation of defendant company, its intention to construct a street railway connecting that neighborhood with the cities of Pittsburgh and Allegheny, and requested of plaintiff the privilege of laying its tracks upon the Pittsburgh and Freeport road in front of and along her property. Both plaintiff and her husband declined to sign a written consent to construct the railway, bu stated they would be glad to see a street railway there and had no objections to defendant occupying the road in front of their property with its tracks. Subsequently, on May 12, 1906, the parties not being able to agree upon the amount of damages plaintiff should receive, this bill was filed. At the trial defendant proposed to file a bond in any sum the court might suggest with the Union Trust Company of Pittsburgh as surety to secure plaintiff in any damages she might recover.

5. Defendant, relying upon plaintiff's assertion that "she had no objection to the railway" and that "all we want is our proper damage," has procceded in good faith with the preparations to construct its line of railway.

6. Since October 12, 1905, defendant has entered into contracts for the construction of its railway and its equipment, has done considerable grading, has the ties and rails upon the ground, and is proceeding in good faith to complete the same, which when completed and ready for operation its property will represent an investment of about $1,250,000.

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7. The Pittsburgh and Freeport road is what is known as a county road, having been improved by the county of Allegheny under the provisions of an act of assembly which provides for the permanent improvement of certain public roads, approved the 26th day of June, 1895, P. L. 336.

8. Defendant has procured the consent of the county of Allegheny to construct its railway upon the Pittsburgh and Freeport road and has received also the consent of the proper municipal officers of each borough and township through which its railway will be constructed.

CONCLUSIONS OF LAW.

1. While plaintiff has given no written consent to defendant company to construct its railway upon the road in front of plaintiff's property, we think the verbal consent given is sufficient at least to estop plaintiff from carrying on these proceedings for an injunction. Plaintiff became aware of defendant's intention to construct its railway last October, and she knew that the company through its officers was acting upon her assertion that no objection to the railway would be raised by her. Under these cir cumstances defendant, having acted in good aith, it seems to us, should be permitted to proceed with the construction of the railway upon the public road in front of plaintiff's property, especially as no injury will result to plaintiff for which she cannot obtain adequate compensation. Defendant having offered to file a bond in this court with the Union Trust Company of Pittsburgh as surety, conditioned to pay plaintiff any damage she may sustain by reason of the construction of its railway, we are of opinion that such protection is all plaintiff is entitled to under the cirumstances.

2. In view of the foregoing conclusion, if defendant will within ten days file in this court its bond in the sum of $1,000 with the Union Trust Company as surety, to secure the payment of any damages that may be awarded plaintiff, the bill in this case will be dismissed.

For plaintiff, *E. W. Arthur* and *H. G. Wasson.*

For defendant, *Reed, Smith, Shaw & Beal* and *Stone & Stone.*

(Common Pleas No. 2, Allegheny Co.)

SWINGLE v. ITZEL.

Set off—Statement vague and indefinite.

A statement of set off to a suit on an accepted draft alleged that defendant spent $150 in hauling and setting up new bases on the monuments for which the draft was given. Held, that the statement was too vague and indefinite and judgment should be entered for plaintiff.

No. 674 October Term, 1906. Sur rule for judgment.

Opinion by SHAFER, J. Filed November 16, 1906.

The affidavit of claim alleges that the firm of Swingle & Ford sold to the defendant two granite monuments on June 1, 1904, and received from him an acceptance of a draft drawn by them for the amount; that when this draft became due on the first of August, 1904, the defendant requested Swingle & Ford to renew the same, which they did, and another draft was drawn and accepted by the defendant, dated August 1, 1904, for the amount; that afterwards on July 15, 1904, Swingle & Ford sold the defendant another granite monument, and a like draft was drawn and accepted for the amount; that each of these drafts was duly presented for payment at the places designated therein, and that payment was refused, whereupon the drafts were endorsed to the present plaintiffs. The affidavit of defense does not state whether the defense is made to the whole or to a part of the claim, as required by the rules of court, but says that the defendant has "a legal defense to the claim made by the plaintiff." Defendant then states that he drew the drafts in question without inspection of the monuments, but that the monuments were to be first class; that when the monuments were erected in the cemeteries the bases of all of them became defective and turned red; that the defendant notified Swingle & Ford of their imperfect condition, which they admitted by sending new bases of new material; that defendant took these bases and hauled them to the cemeteries and put them under the monuments "at a cost of $150 to him." He further denies that the plaintiffs are holders for value of the drafts sued on.

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That the plaintiffs are not holders for value of the drafts in question so as to preclude the defendant from setting up the equities between himself and the drawers is, of course, perfectly evident from the fact that the endorsement to them is not alleged to have been made until after refusal of payment and therefore after the drafts were due. Whether they were holders for value or not makes no difference therefore to the defendant, and is no defense to an action upon the drafts, which are admittedly endorsed over to them. The only defense set up in the affidavit is the allegation that the hauling and resetting of these bases of the monuments in question were done "at a cost of $150 to him." As the whole value of all three monuments together was only $328, it seems very remarkable that the taking of three bases of such monuments to the cemetery and placing them under the monuments should cost $150. The defendant does not say upon what terms Swingle & Ford sent the new bases, or that they refused to send them to the cemetery or set them up, nor does he give a single item as to the cost of the hauling or labor involved. So indefinite an allegation would be entirely insufficient in an affidavit of claim, and where it is sought to set off such a charge against a plaintiff's demand, the items of the claim ought to be given with some reasonable certainty.

We are of opinion that the defense claimed by way of set off is not sufficient and for this reason and because the affidavit was made in disregard of the rule of Court above mentioned, the rule must be made absolute.

For plaintiff, *George H. Rankin.*

For defendant, *J. C. & W. C. Dicken.*

(Common Pleas No. 2, Allegheny Co.)

MORGAN v. MILLER BRICK CO.

Justice of the peace—Certiorari—Time of issuing

Where it appeared that a summons before a justice was served personally and defendant took an appeal and two months later issued a certiorari the latter writ is too late and judgment thereon should be affirmed.

No. 901 October Term, 1906. Certiorari to justice of the peace.

Opinion by SHAFER, J. Filed November 16, 1906.

The action is assumpsit, and to the summons a return was made that a true copy of the original was served personally on the defendant at his residence. The hearing was had on July 12, 1906. The defendant did not appear. The constable was sworn as to service of summons. On July 31, 1906, the defendant made an affidavit for appeal and entered bail. The certiorari was taken out September 28, 1906.

It is perfectly evident from this record that the defendant knew, much more than twenty days before the taking of the certiorari that a judgment had been entered against him. His writ was therefore too late and judgment must be affirmed.

For plaintiff, *George J. Campbell.*

For defendant, *Watterson & Reid.*

Court of Common Pleas,

FRANKLIN COUNTY.

SMITH, Executor, v. SMITH.

Practice (C. P.)—Assumpsit—Declaration—Procedure act of 1887—Suit on specialty—Profert—Statute of limitations—Pleading.

The old rule that a party claiming by specialty must in his pleadings make profert of it or show an excuse for not doing so, has not in substance been abrogated by the procedure act of 1887. But profert and therefore production by plaintiff at the trial are excused where the instrument is both alleged and shown to be in defendant's wrongful and illegal possession.

The reason why the matter relied upon as constituting an excuse for non-profert must be pleaded lies in this: "that, being matter going to the right to maintain the action (or defence as the case may be), it is traversable, or specially demurrable.

In order to sue upon an instrument ordinarily held by the party entitled under it, plaintiff must have, at the time, either possession or the right of possession of it. Obviously there can be no excuse for non-profert which does not as an essential part of it involve an assertion of such right.

If the statute of limitations has fully run against the right the plaintiff asserts, the invoking of it by defendant must have the effect of destroying the excuse for non-profert and invalidating the

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explanation of non-possession and non-production. The statute of limitations, however, is a defence upon the facts, to be raised not by demurrer but by plea.

The application of the statute of limitations depends upon the real nature of the claim involved, not upon the form of the proceeding by which it is sought to be enforced, and a party cannot avoid its bar simply by choosing one method of attack rather than another.

In so far as the statute of limitations interdicts proceedings for the redress of wrongs against a party pleading it, it distinctly permits him to take advantage of his own wrong in the precise sense in which that criticism is here suggested. In truth, however, the application of the statute involves no such solecism. It operates not upon the merits of the cause of action, but upon the claimant's remedy for its enforcement. And as regards the redress of wrongful acts, it runs from the date of their commission unless actively concealed.

No. 54 April Term, 1904. Assumpsit.

Opinion by ENDLICH, J., specially presiding.

The declaration in this action of assumpsit contains two counts, as has been held allowable under the procedure act of 1887 (*Winters* v. *Mowrer*, 1 Pa. Sup. Ct. 47). The defendant pleaded non-assumpsit, payment and the statute of limitations. By the verdict of the jury (taken for the purpose of obtaining a determination of the disputed questions of fact) considered together with the uncontroverted evidence, it appears that on April 1, 1893, defendant gave to his father, plaintiff's testator, a judgment note under seal for $1,000, payable one year thereafter; that on February 15, 1896, the father being sick and weak, defendant, paying but a small sum, procured a return to him of the note and a receipt in full by means of conduct and language amounting, under the circumstances, to coercion depriving the father of his free agency in the matter; that subsequently the father got well and lived until November 3, 1902, without taking any legal action to recover from the defendant the note or the balance of the debt, though frequently declaring to him or in his presence that it still subsisted and that payment of it would be exacted. There is no evidence of any act or declaration on defendant's part accounting for his father's non-action. If the occurrences attending the surrender of the note and the execution of the receipt are controlling of the question of plaintiff's right to recover, the submission of the evidence to the jury would seem to have been proper, and its finding for plaintiff unimpeachable on the ground of insufficiency of the evidence, whether plaintiff be regarded as standing in the situation of a complainant in equity or not.

It was said by Mr. Chief Justice Gibson, in *Brawdy* v. *Brawdy*, 7 Pa. 157, 159, that in an equitable action a verdict for plaintiff might be well found on the oath of a single witness because there was (and at that time could be) no opposing oath of the defendant. A fortiori must that be true where, as here, the defendant, though a competent witness, because plaintiff had called and examined a living witness to the transaction (*Brumbach* v. *McLean*, 187 Pa. 602), does not take the stand. See *Green* v. *Brooks*, 215 Pa. 492. His affidavit of defence not being offered by plaintiff, who alone could have offered it (see *Bowen* v. *DeLattre*, 6 Whart. 430), is no part of the evidence and not to be considered. *Maynard* v. *Bank*, 98 Pa. 250; *Mullen* v. *Ins. Co.*, 182 Pa. 150; *Philadelphia* v. *Armstrong*, 16 Pa. Super. Ct. 55.

The serious question in this case, however, is whether, in the face of the plea of the statute of limitations, there can be any recovery.

The old rule that a party claiming by specialty must in his pleadings make profert of it (*Sigfried* v. *Levan*, 6 S. & R. 308, 310; 1 Chitty, Pldg., p. 378) or show an excuse for not doing so (ibid.), has not in substance been abrogated by the procedure act of 1887. It requires the exhibition of a copy of any writing sued upon (section 3). In strictness, a "copy" signifies a "true transcript of an original writing" (Anderson, Law Dict.) ad verb., actually existing, and made from it (see *Jordan* v. *Keller*, 5 W. No. 341; *Com.* v. *Laws*, 7 id. 80; *Stoops* v. *Post*, 15 id. 176), and presumes possession of the original (3 Bac. Abr., Bouvier's Ed'n., 1876, p. 592). It is a copy in that sense that is required by the act wherever it can be furnished. The averment in a declaration under the procedure act that the suit is brought upon a specialty, reciting it *haec*

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verba and declaring the recital to be unqualifiedly a "copy," is therefore an averment of possession of the original and to all intents profert of it. It is ancient law that where profert is made the instrument must be produced at the trial, and no excuse whatever for its non-production can avail. 1 Archbold, N. P., p. 208; 1 Selwyn, N. P., p. 415. The very purpose of the procedure act to secure in the declaration a truthful, precise and complete statement of the essential facts of plaintiff's case and in the proofs a strict correspondence with the same (see *Bank* v. *Kopitzsch Co.*, 161 Pa. 134, 137; *Electr. Co.* v. *Mfg. Co.*, 167 id. 530, 534; *Clark* v. *Lindsay*, 7 Pa. Super. Ct. 43, 47; *Hennessy* v. *Anstock*, 19 id. 644, 647) would seem to forbid a recovery upon a declaration or count professing to set forth a "copy" of the specialty sued on, where the proofs show that the instrument is not in plaintiff's hands, but has for years been and still is in defendant's possession, however wrongfully obtained. Nor in such circumstances can the plaintiff derive any aid from section 184 of the rules of this court, because the so-called "copy" in the declaration is not a copy at all, but a reproduction, and because all the rule dispenses with is proof of execution, etc., not the production of the instrument or proof of its contents in some other lawful way.

But profert and therefore production by plaintiff at the trial are excused where the instrument is both alleged and shown to be in defendant's wrongful and illegal possession. 1 Sellon, Pract., p. 286; 2 Wigm., Evid., section 1199; *Robinson* v. *Curry*, 6 Ala. 842. The second count of plaintiff's declaration in this case makes that allegation in excuse of the profert required by the procedure act in the exhibition of an accurate and real copy, with all that term implies. Judged not by the rules of common law pleading, but by the procedure act, this count ought not to be treated as founding plaintiff's action upon the consideration of the note rather than upon the note itself. True, the averment of a consideration is ordinarily unnecessary in an action upon a specialty. 1 Chitty, Pldg., p. 330. Yet, in a declaration under section 3 of the procedure act, a rehearsal of the entire transaction culminating in the execution and delivery of a sealed note can hardly be understood to negative an intent to claim upon the promise to pay; and where, as here, that promise is distinctly averred to have been made in the form of a sealed note, and an excuse is alleged for non-profert of the same, the intention to found the action upon it seems clear enough. There would, indeed, otherwise be no sense in offering such excuse at all. It is only in suits upon written instruments, etc., that the procedure act requires copies to accompany the declaration

The reason why the matter relied upon as constituting an excuse for non-profert must be pleaded lies in this: that, being matter going to the right to maintain the action (or defence, as the case may be), it is traversable (1 Chitty, Pldg., p. 378) or specially demurrable (see *Hill* v. *Marsden*, 6 M. & W. 718). It is too plain for discussion that, in order to sue upon an instrument ordinarily held by the party entitled under it, plaintiff must have, at the time, either possession or the right of possession of it. Obviously there can be no excuse for non-profert, no explanation of non-production, which does not as an essential part of it involve an assertion of such right. Thus there is no virtue in an allegation or proof that the instrument is in the hands of a third party holding it by agreement between plaintiff and defendant (*Hill* v. *Marsden*, supra), or simply that it was delivered to the opposite party (*Wallis* v. *Harrison*, 4 M. & W. 538). Plaintiff's allegation, on the other hand, that it came into defendant's possession by foul means and is wrongfully detained by him is an assertion that plaintiff still has the right of possession of it—that possession of it is still of right demandable by him. Now that may be true, or it may not be true. The defendant has a right to deny it and to have the judgement of the court upon it. Clearly, if the statute of limitations has fully run against the right the plaintiff asserts, the invoking of it by defendant must have the effect of destroying the excuse for non-profert and invalidating the explanation of non-possession and non-production. The statute of limitations, however, is a defence upon the facts, to be raised not by demurrer but by plea. *Barclay* v.

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Barclay, 206 Pa. 307. Consequently defendant in this case not only had the right to plead the statute to plaintiff's allegation of defendant's illegal procurement and retention of the note, but was bound to do so unless he chose to waive the statute altogether. Defendant pleaded the statute. To what? Not to the note; for against it, being a specialty, the statute was no defence. Manifestly, to any possible claim to recover apart from the specialty, and what is more to the point, to the matter alleged in excuse of profert and the assertion necessarily involved in it. Being so pleaded, the statute became an issue in the case decisive of plaintiff's right to recover, quite as much as the issue made by the plea of non-assumpsit or the plea of payment. Neither was that issue decided or put out of the case by defendant's production of the note at the trial upon notice and call by plaintiff. Had it not been produced, and had the plaintiff thereupon gone on to prove it by secondary evidence, the plea of the statute would still have remained to be passed upon. The production of the note in court was a production of it to the court (Sec. 2 Wigm., Ev., section 1185), not a giving up of it to the plaintiff. He was entitled, indeed, to use it as evidence for himself for every purpose for which under the circumstances it was evidence (ibid). As far back as *Wymark's Case*, 5 Co. Rep. 75, it was adjudged that

"When a deed is in court one may take advantage of it without having it in hand . . . When the deed is by one showed to the court, it is not respective as to him, but all others shall take advantage thereof."

But whilst the production of the note made it evidence, indeed the only possible evidence (1 Whart., Ev., 2d Ed., section 160; (4 Wigm., Ev., section 2447) for plaintiff of the fact that there was such a note and of its contents, it did not invest him with possession of it in the sense in which possession of an obligation by the obligee at the trial prima facie shows his right to a verdict of the amount of it (see *Lerch* v. *Bard*, 162 Pa. 307, 312), or in which is non-possession of it indicates lack of title to it. See *Brnmbach* v. *McLean*, 196 id. 321, 324. Nor did the production of the note divest the defendant of his possession of it for the purposes of the rule that possession of an obligation by the obligor raises a presumption that he obtained it by payment (see *Porter* v. *Nelson*, 121 id. 628, 629), and is therefore entitled to hold it. In short, the production of the note and its use by plaintiff as evidence left the right of plaintiff to maintain his action in the face of the plea of the statute of limitations entirely unaffected.

The situation then presents itself in this wise: Plaintiff has sued upon a note under seal, which he does not have. An obligation of that sort is presumed to be in the hands of the obligee as long as he has anything to claim under it, whilst its possession by the obligor is prima facie proof of his right to it. In compliance with a notice from plaintiff, defendant at the trial produces the note, thus permitting its use as evidence of the existence and tenor of the note, and at the same time establishing his possession of it as an indisputable fact. To overcome the effect of the latter it is manifestly indispensable for plaintiff to show that, notwithstanding the same, the right to possess it is still in him—not the mere moral right, of course, but the legally enforceable right. In other words, the establishment of his right to maintain the action involves as an essential element of that right the establishment of his right to exact a return of the note into his full possession. Upon the establishment of that right, and only then, equity, being part of the law, will permit him to proceed as if the return of the note into his hands had been actually enforced. Accordingly, he undertakes to prove his right by showing that defendant obtained the note without payment and by illegal methods, and therefore has no standing to retain it against plaintiff's demand. Unfortunately, in making this proof he discloses a state of facts upon which, beyond any possible question, were he proceeding by an action of replevin to recover possession of the note, the statute of limitations interposed by the defendant would be a complete answer, or had he gone into equity with a bill to compel a surrender of the note, he would have been turned out because of his testator's inaction and his own delay during a period measured by analogy to the

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statute, and upon which an action of trespass, as the statutory substitute for trover, for the value of the note, or of assumpsit upon its consideration, would as surely be barred. Now, it is a familiar doctrine that the application of the statute of limitations depends upon the real nature of the claim involved, not upon the form of the proceeding by which it is sought to be enforced, and that a party cannot avoid its bar simply by choosing one method of attack rather than another. *DeHaven* v. *Bartholomew*, 57 Pa. 126, 129; *Hannum* v. *West Chester*, 63 id. 475, 478; *Wickersham* v. *Lee*, 83 id. 422; *Roller* v. *Meredith*, 4 Pa. Super. Ct. 461; *Trickett, Limitat.*, sections 168-170. It follows of necessity that plaintiff's attempt to make out his right to the possession of the note, and thereby virtually to recover possession of it, in the manner in which he went about it, was as ineffectual in the face of the plea of the statute as it would have been if made in the form of any other known method of procedure. In a word, his proofs have failed him in a vital point of his case, and he cannot recover.

It is neither pertinent nor accurate to say that the conclusion reached offends against the principle that a man is not to take advantage of his own wrong. In so far as the statute of limitations interdicts proceedings for the redress of wrongs against a party pleading it, it distinctly permits him to take advantage of his own wrong in the precise sense in which that criticism is here suggested. In truth, however, the application of the statute involves no such solecism. It operates not upon the merits of a cause of action, but upon the claimant's remedy for its enforcement. *Campbell* v. *Maple's Adm'r.*, 105 Pa. 304, 307. And as regards the redress of wrongful acts, it runs from the date of their commission, unless actively concealed. *Smith* v. *Blachley*, 198 id 173; *Guarantee, etc, Co.* v. *Bank*, 202 id. 94.

And now, Jan. 10, 1907, the motion for judgement n. o. v. is sustained, and it is ordered that all the evidence taken upon the trial of this case and certified be filed as part of the record thereof, that judgment be entered for defendant upon the whole record notwithstanding the verdict, and that an exception be granted to plaintiff to the action of the court in the premises.

For plaintiff, *J. S. Omwake* and *Gillan & Gillan.*

For defendant, *D. Watson Rowe* and *Charles Walter.*

[From Irwin C. Elder, Esq., Chambersburg, Pa.]

Court of Common Pleas,

WASHINGTON COUNTY.

ROACH v. BOROUGH OF WASHINGTON.

Road law—Appeal—Boroughs—Streets—Change of grade—Damages—Evidence—Witnesses—Act of 1891, P. L. 75.

Plaintiff appeared before viewers on the question of a change of grade and claimed damages but refused to say how much and failed to produce witnesses. The viewers awarded him no damages and assessed no benefits, whereupon he appealed. Held, that a motion to quash the appeal should be refused.

No. 124 August Term, 1906. Case stated. Sur motion to quash appeal.

Opinion by McIlvaine, P. J. Filed January 8, 1907.

The facts agreed upon by counsel show that the appellant appeared before the viewers and stated to them specifically that he claimed damages, and notified them that if they did not award damages he would appeal to court. The viewers asked him how much he thought he was damaged by the change of grade, and he replied that he could not tell until the grading was finished. The viewers assessed benefits and damages to other properties on the street, but as to the property of the appellant they neither assessed benefits or damages. Two constructions can be given to their action. The first is that they simply ignored the appellant's claim and did not pass upon it; the other is that they viewed the lot and improvement, and from what they saw adjudged that his benefits and damages were equal, and that the market value of the property was not affected by the change of grade. If the facts were as indicated by the first construction, then the appellant's claim for damages has never been passed upon,

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and he would have either the right of appeal or the right to an individual view under the act of 1878, for surely he cannot be deprived of the trial which the laws of the land guarantee him. If the facts were as indicated by the second construction, then the viewers' judgment as to whether the appellant's lot was damaged or not is subject to review on appeal. But it is said the appellant called no witnesses before the viewers, and was himself unable to fix the amount of damages that had been done to the lot. But this surely would not deprive him of the right of appeal. If he had not appeared and had allowed the matter (after notice) to go by default, then it might be claimed with some show of reason that he had lost his right of appeal. But he appeared, and he not only claimed damages but he notified the viewers that if they failed to give him damages he would appeal. The viewers were on the premises, they had the plot showing how the change of grade would affect the lot, they had evidence upon which a judgment on the question at issue could be formed, and because the appellant did not see fit to supplement this with the testimony of witnesses in no way affected his right of appeal. An appeal might be denied because a lot owner did not present his claim, but certainly not because he did present all the evidence available to support that claim. Appeals are not allowed that the lot owner may present after-discovered evidence, but because the award of the viewers has done him an injustice.

And now, January 8, 1907, motion to quash appeal overruled at cost of appellee.

For plaintiff, *R. W. Parkinson, Jr.*

For defendant, *Miller & Miller.*

[From Harry Russell Myers, Esq., Washington, Pa.]

WITNESSES. (COMPETENCY — CRIMINAL LAW—CONFESSIONS). MONT.

Under the provisions of the Montana Statutes to the effect that all persons who, having organs of sense, can perceive, and perceiving can make known their perceptions to others, may testify as witnesses, it is held in State v. Lu Sing, 85 Pac. 521, that a Chinaman who stated that he did not know the nature of the oath he had taken as a witness, and did not know what kind of an oath was administered in the courts of China, but who also stated he could tell what he knew, and that what he would say would be the truth, was a competent witness.

This case also contains a rather curious point involving the competency of an admission alleged to have been made by defendant. The police officer who arrested defendant testified that the latter made a number of statements while on the way to the jail. The defendant was a Chinaman and he spoke English very poorly, so that the officer was unable to understand all that defendant said, but the officer testified that he did understand the defendant's statement "If I kill him, me good man, if I not kill him, no good," and again, "If me no kill him me no good man, and if Tom Sing dead me die happy." It was contended that these portions of the conversation were inadmissible, because the officer was unable to detail the entire conversation. In holding the evidence admissible the court declares that it is not in conflict with the rule that where the state offers only a part of the conversation embodying a confession, the defendant has a right to have the whole of the conversation before the jury, but declares that the great weight of authority and reason favor the proposition that the mere fact that a witness did not hear all of the conversation or did not understand it all, does not render incompetent what he did hear or understand, and in such case the evidence goes to the jury for what it is worth. Westmoreland v. State, 45 Ga. 255; Woolfolk v. State, 85 Ga. 69, 11 S. E. 814; State v. Elliott, 15 Iowa 72; State v. Moelchen, 53 Iowa 310, 5 N. W. 186; State v. Madison, 47 La. Ann. 30, 16 South 566; State v. Vallery, 47 La. Ann. 182, 16 South 745, 49 Am. St. Rep. 363; State v. Daniels, 49 La. Ann. 954, 22 South 415; Commonwealth v. Pitsinger, 110 Mass. 101; 3 Wigmore on Evidence, § 2100; Wharton's Criminal Evidence, § 688; People v. Daniels, 105 Cal. 262, 38 Pac. 720; People v. Dice, 120 Cal. 189, 52 Pac. 477.—*The Green Bag.*

The right of an attorney to a lien upon his client's cause of action for tort is denied in Boogren v. St. Paul City R. Co. (Minn.) 3 L.R.A. (N.S.) 379.

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PITTSBURGH, PA., FEBRUARY 27, 1907.

District Court, United States,

WESTERN DISTRICT OF PENN'A.

In the Matter of A. SUNSERI, Bankrupt.

Bankrupt—Merchandise—Fraudulent connivance—Seizure by receiver—Practice.

A temporary receiver of a bankrupt presented his petition praying for an order to seize certain property alleged to belong to the bankrupt and in the hands of a third person on the ground that it had been transferred by the bankrupt without consideration and in fraud of creditors. The answer of the person in whose possession the goods were, denied the allegations of the petition and averred that the goods were purchased from the bankrupt in the regular course of business and at a fair price. Held, that such seizures should not be authorized except upon a very clear statement of fraud with a bond to protect the rights of third parties in whose hands the goods might be found. The petition for such seizure should be presented by a creditor and not by the receiver.

Where as in this case the answer to the petition sets up something more than a mere colorable title to the goods—the court has no authority to summarily determine the questions of title but must leave the parties to their appropriate plenary action.

Unless the property to be seized is of an exceedingly perishable nature or the circumstances of the case particularly urgent, the better practice is to give the person whose goods are to be seized an opportunity to be heard on a rule to show cause.

No. 3469, in Bankruptcy.

Opinion by EWING, J. Filed February 9, 1907.

On January 18, 1907, a creditor's petition praying for the adjudication of A. Sunseri as a bankrupt was filed and on the same day a petition of various creditors praying for the appointment of a receiver was presented, whereupon Charles P. O'Connor was appointed receiver, with authority to take charge of, preserve and dispose of the assets of said bankrupt, subject to the approval of the court.

On January 31st the said receiver presented his petition setting forth the foregoing facts and alleging that the said Sunseri had entered into a conspiracy with P. Billante & Company of Huntingdon, Penna., to defraud the creditors of said Sunseri, and that in pursuance of said conspiracy large quantities of goods were shipped by Sunseri to P. Billante & Company at Punxsutawney, Pa., where they had a store and that some of the said goods were transferred and shipped by Billante from there to their store at Huntingdon and that some goods purchased by Sunseri he had shipped direct to Billante & Company, and that these goods so disposed of by Sunseri to Billante & Company constituted a large portion of his assets, and that the conduct of these parties was for the purpose of hindering, delaying and defrauding the creditors of said Sunseri, and praying for an order to seize said goods in the hands of P. Billante & Company in order that they might be preserved to the bankrupt's estate.

Said petition further alleged that P. Billante & Company were financially irresponsible and that the identity of the members of the firm had not been established and was unknown in their locality.

On the same day the prayer of that petition was granted and the said O'Connor directed to take into custody and hold subject to the further order of this court, the merchandise transferred to P. Billante & Company at Punxsutawney and at Huntingdon, and the said P. Billante & Company were directed to propound their claim within ten days after service of said order.

Pursuant to said order the receiver took charge of the stores of the said Billante & Company at Huntingdon and Punxsutawney.

On February 5th Billante & Company, by Philip Billante, one of the partners, filed an answer to the receiver's petition in the nature of a counter petition, setting forth that they had no knowledge whatever of the

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financial condition of Sunseri and never entered into any conspiracy with him, but that the goods so shipped by Sunseri to them were purchased by them in the ordinary course of business for the purpose of conducting their stores at Huntingdon and Punxsutawney, the former of which they opened about the 1st of April, 1906, and the latter apparently sometime subsequent, and that for all of said merchandise the prices paid were full and adequate. That all of said merchandise had been paid for except one bill for a shipment in January, 1907, amounting to about $40.75, against which they have a good defense for shortage and damaged goods, and that said bill, together with a bill of January 7, 1907, of $140, had been placed by Sunseri in the hands of an attorney for collection from them, payment of which they refused, as to the $40 for the reason aforesaid, and as to the $140, for the reason it was paid for in cash and they hold a receipt therefor, which is attached to their said answer.

And the said respondents allege that the order of this court was without authority for the seizure of their property without notice, process or suit; that it was beyond the jurisdiction of this court to seize any goods outside its territorial limits (the said town of Huntingdon being in the middle district of Pennsylvania), and that for the reasons above stated as to their claiming this property adversely and with more than colorable title, this court is without jurisdiction to determine the title to it in this summary manner.

Upon this petition and answer the case was argued by counsel, without any testimony having been taken and upon the facts as set forth in said petition and answer.

It will be noted the answer does not deny the transfer of the goods from the alleged bankrupt to Billante & Company, but does deny explicitly any knowledge of Sunseri's insolvency at the time, any conspiracy with Sunseri, any object in the purchase of said goods other than for the proper and ordinary conduct of their business, and even any indebtedness therefor to said Sunseri beyond the controverted claims aforesaid.

The petition of the receiver upon which this order was granted gives no facts for the allegation of conspiracy and intent to hinder, delay and defraud creditors beyond the shipments to Billante & Company from time to time during the few months preceding the filing of the petition in bankruptcy, and facts in regard to the extent of the purchases and sales made by Sunseri during the same period as shown by his books now in the hands of the receiver. As the case now stands it does not seem necessary to dispose of the question of extra-territorial jurisdiction, or the question of the authority of the court to summarily seize property alleged to belong to the bankrupt in the hands of third persons. When necessary for the preservation of the estate of the bankrupt and the security of the creditors, the latter authority can hardly be questioned, under the various provisions of the bankrupt act having that object in view; but the manner and practice regarding such seizures, as pursued in this case, may very well be called into question. I do not think the court should authorize such seizure in any case except upon a petition very clearly and definitely setting forth all the facts, not merely suspicions, and after exacting proper security to protect the rights of the third parties in whose hands the goods are alleged to be. Such petition should be presented by the creditors, rather than by any temporary receiver, and they should be required to give the bond aforesaid before such seizure should be authorized.

When property alleged to have been disposed of by the bankrupt in fraud of his creditors is in the hands of third parties and a seizure thereof properly made under authority of the court, if such third parties set up an adverse claim to said property, which is more than merely colorable, and said parties are not merely the agent or representative of the bankrupt, the court can proceed no further than the ascertainment of these facts, but must relegate the parties to some proper plenary action.

It will be seen from the statements contained in the petition and answer that the claim of Billante & Company to the goods in question is more than merely colorable and that they are claiming in their own right and are not in any respect holding said property as agents or representatives of Sun-

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seri. It therefore follows that this court has no authority to proceed further in the matter, or summarily dispose of the question of title, no matter how fraudulent the transaction between Sunseri and Billante & Company may eventually prove to have been, but that said Billante & Company are entitled to have their title to said goods determined in an appropriate plenary action: *In re Teschmacher & Mrazay*, 127 Fed. Rep. 728; *In re Davis, Taylor & Company*, 16 A. B. R. 486; *Louisville Trust Co.* v. *Comingor*, 184 U. S. 18.

Moreover, it appears that the receiver exceeded his authority when he took possession of all the goods of Billante & Company in their respective stores, regardless of the sources from which they obtained them.

It may be added that in all such proceedings, unless the property is of an exceedingly perishable nature or the circumstances of the case particularly urgent, it would be better before any order for seizure were granted to give the party in whose hands the property is alleged to be prior notice, and an opportunity to be heard on a rule to show cause.

The claim of the receiver in his petition that the disposition of this property was in violation of the provisions of the act of assembly of Pennsylvania of March 28, 1905, was abandoned on the argument.

Should the creditors of Sunseri after further examination be satisfied that they are able to show such a transaction between Sunseri and Billante & Company regarding these goods as to make the custody of Billante & Company merely that of agents of Sunseri, or to show in them nothing more than a merely colorable title, they can present their petition to court for another order, and for that purpose and for the reasons above given the order of January 31st last will be vacated without prejudice. But the creditors must understand that in any event they would be required before the grant of any order by the court to give adequate bond to protect the rights of said Billante & Company, in case it should be found that the proceeding was not well founded.

Therefore, it is ordered and directed that the order of seizure of January 31, 1907, be vacated and the custody of the property in question restored to P. Billante & Company, but without prejudice.

For receiver, *Eichenauer & Ache.*
For P. Billante, *E. L. Mattern.*
For bankrupt, *Breck & Vaill.*

Orphans' Court,

ALLEGHENY COUNTY.

In re Estate of VICTOR L. CRABBE, Deceased.

Wills—Construction—Joint use.

A gift of "everything I own to my beloved wife" "to be used by her for the joint interest of herself and two children, Elizabeth and Susan," vests in the children a joint beneficial interest with their mother and makes her testamentary trustee during their minority.

No. 97 January Term, 1907.

HAWKINS, P. J.

STATEMENT.

The question involved in this case is what interest the widow takes under the first clause of this decedent's will, viz:

"I give and bequeath everything I own to my beloved wife, Susie P. Crabbe, to be used by her for the joint interest of herself and two children, Elizabeth and Susan."

These children are in their minority. The will seems to be holographic.

OPINION. Filed February 18, 1907.

While the gift of this estate was in the first instance to the widow, it is immediately followed by a provision which shows that the children of testator were intended a share, at least during their minority, in the beneficial enjoyment of the estate. "Everything" was "to be used for the joint interest" of the widow and children. The legal title was vested in the widow, and the estate was no doubt to be handled by her; but we must look to the imperative terms of the added clause for a definition of her beneficial interest. She was there given no power of use or consumption other than for the "joint interst" of herself and children. No doubt Mr. Crabbe had often heard the expression "for their joint interest" in business ventures and probably used it here in the ordinary sense implying common ownership. It

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is much broader in its scope than that which was the subject of controversy in *Paisley's Appenl*, 70 Pa. 153, and its class. The fact that "everything" was "to be used for the joint interest" or advantage of themselves as well as their mother, ne essarily implied an intent to vest in them a property right in the estate itself; whereas in Paisley's case there was simply a gift of maintenance.

This construction conforms with the disposition which would have been expected in the circumstances. The law presumes that a man will make provision for his own offspring; and an intent to the contrary must clearly appear: *Bruchman's Estate*, 195 Pa. 363. What will be the status of these children on leaving home it is not necessary to decide; but certainly denial of the "interest" of these children in the estate during their helpless infancy is not entitled to favorable consideration.

It follows that the estate must be awarded in the terms of the will to Mrs. Crabbe "to be used for the joint interest of herself and children during the latter's minority—final disposition to be made at majority.

For accountants, *Bruce Millard.*

For guardian, *James E. Hindman.*

Court of Common Pleas No. 2,

ALLEGHENY COUNTY.

WOODS v. SAMPSON & CO.

Justice of the peace—Certiorari—Time of issuing.

Where it appears that a justice of the peace had jurisdiction a certiorari will not be sustained, it appearing that the writ was taken out more than twenty days after an attempt to take an appeal.

No. 1008 October Term, 1906. Sur rule to quash writ of certiorari.

Opinion by SHAFER, J. Filed November 14, 1906.

The action is trover under the name of trespass before a magistrate for a diamond ring bailed by the defendant in error to the plaintiff in error. An appeal was taken but was not filed in time for reasons which appear in the testimony taken, and the application was made to the Caurt of Common Pleas No. 1 to allow the appeal to be filed *nunc pro tunc*, which application was refused. Up to that time it might well be believed that the plaintiff in error did not know that judgment had been entered against her, and had reason to believe from what was said to her by the plaintiff's agents that no judgment was claimed against her. If she had taken out a writ of certiorari within twenty days after that time, it would have been in our power to relieve her. As she did not do so, but began the present proceedings more then twenty days after the application to the Court of Common Pleas No. 1, she is not entitled to a certiorari, unless it appears that the magistrate had no jurisdiction. It is claimed by counsel for the plaintiff in error that as the testimony shows that the ring was sold to her on the instalment plan for $400 and only a few dollars to pay thereon, it appears that the plaintiff had reduced a claim of over $300 to that amount for the mere purpose of giving jurisdiction to the magistrate. If this were an action on a contract, we would be inclined to think this position correct, but as the action sounds in tort and is merely for the value of the rent, there can not be said to be a reduction of the claim for the purpose of giving jurisdiction. The price for which the ring was sold by the defendant in error on the installment plan furnishes little indication of its value.

The rule must therefore be made absolute.

For plaintiff, *W. H. McGary.*

For defendant, *John F. Tim.*

(Common Pleas No. 2, Allegheny Co.)

STATE BANK OF ELIZABETH v. BOLANDER.

Negotiable instrument—Notice of non-payment—Affidavit of defense.

In an action on a note against an endorsee an affidavit of defense stating that no notice of non-payment was delivered to him by plaintiff is insufficient.

No. 356 October Term. 1906.

Opinion by SHAFER, J. Filed November 26, 1906.

The action is a promissory note by endorsee against first endorser. The affidavit of defense avers that the note when due was

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duly presented and payment demanded of the maker's executors and payment refused, and that of all this the defendant had due notice on the same day. The affidavit and supplemental affidavit of defense aver that "no notice of the non payment of said note by the maker or his representatives was delivered to him by the plaintiff at the time said note became due and payable, and he had no knowledge of the non payment of said note until about two months after the maturity thereof." It might well be that no notice was delivered to him by the plaintiff and it might be that notice of demand and refusal was duly sent to the defendant which he did not receive. The affidavit therefore does not appear to be a sufficient denial of the allegation that the defendant "had due notice." In a case where a defendant in his original affidavit is careful to make his denial of a waiver of protest to the best of his recollection and belief, and then a considerable time after, in a supplemental affidavit, denies point blank that he ever made such a waiver or that it was signed by him, we do not feel ourselves bound to interpret his denials in regard to the notice of protest very liberally in his favor.

The rule is therefore made absolute.

For plaintiff, *John B. McBride.*

For defendant, *C. A. Lewis.*

Power of Directors to Appoint Executive Committee.

An interesting question in the law of corporations is to what extent a board of directors may confide their powers to an executive committee. The right to delegate all their powers to such a committee, even though with the consent of the stockholders, would seem to be denied them by a dictum in a recent case. *Canada-Atlantic and Plant S. S. Co., Ltd.* v. *Flanders*, 145 Fed. Rep. 875 (C. C. A., First Circ.). On this point there is curiously little authority.

It is obvious that whether a board of directors may entrust their powers to an executive committee or not depends on the nature of their office. As to this, there are divergent views. One theory is that the directors are the agents of the stockholders to manage the business, and, as such, are unable to delegate their functions on the principle *delegatus non potest delegare.* This view, however, seems unsound, for if it were true, the stockholders, being principals, could at any time take charge of the affairs of the corparation and manage them to suit their wishes. This, it is settled, they cannot do. The other theory is that the directors represent the corporation completely, and can do what they as individuals within their own business could do. Hence, as principals, they can delegate the performance of acts which they themselves can perform. This view, likewise, is open to criticism. The directors have no common law powers as directors; they exercise merely granted powers. However discordant the authorities may seem, in the ultimate they agree that these powers are held by the directors in some sort of a fiduciary relation, and are to be exercised for the benefit of the stockholders after the analogy of a trust relation. It is axiomatic that a trustee may not delegate his duties as such to a third party, for it is the exercise of his judgment and his discretion which is required by the creator of the trust. It is believed that the same is true of directors. This being so, how far may they delegate their powers to an executive committee?

It may be admitted that, even in the absence of permission, the board of directors, however created, may delegate to agents or committees the doing of acts merely ministerial and the management of ordinary business, provided such business does not involve the exercise of executive functions regarding the "policy" of the corporation. The consent to delegate must be implied in such cases, for the directors in a large business are incapable of personally attending to its various details. It may also be admitted that if the statutes under which the corporation is organized, or its charter, contain provisions allowing the directors to entrust any or all of their duties to agents or committees they may do so, for any duty to be exercised in a fiduciary relation may be delegated if the proper permission is given. And the same is true where the charter vests the management of the business in the stockholders, who by by-laws create a board of directors and also consent to the delegation

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of powers to an executive committee. In all other cases, however, the power to delegate the duties of deciding the policy of the corporation and of generally overseeing its affairs should be denied. It is the exercise of the discretion and judgment of the directors for the benefit of the stockholders which is expected and required. It is their discretion and judgment that should be exercised.—*Harvard Law Review.*

Cough-Medicine.

I had a little husband—
I never knew a worse,
For better than his wife or life
He loved his little purse.

I did my best to wheedle him—
He saw my deep intent,
And though he had a chronic cough,
He never coughed a cent.

So I sought a little lawyer—
My husband's own close crony—
And divvied with the man of law
My lawful alimony.

—*Reginald Wright Kauffman, in Saturday Evening Post.*

It has been held, in United States v. Simon, 17 Am. B. R. 41, that the provision of section 7 (9) of the Bankruptcy Act, that no testimony given by a bankrupt shall be offered in evidence in any criminal proceeding creates an effective obstacle to a conviction for perjury charged to have been committed by a bankrupt in testifying under oath be ore a referee, in support of claims against the estate in bankruptcy.

The case of In re Kolster, 17 Am. B. R, 52, holds that a bankrupt, who anterior to the four months period voluntary surrenders an option to purchase certain real estate of which he is the lessee, and makes no mention of the same in his schedules, may not be charged with a concealment of assets from his trustee, in the absents of evidence of a secret trust or agreement that the one to whom the option was surrendered, was to hold the property for the benefit of the bankrupt.

A transfer by a partner of individual property with intent out of the proceeds to prefer an indorser upon the notes of the firm although an act of bankrupcy as against the said partner, is held, in Hartman v. John Peters & Co., 17 Am. B. R. 61, not sufficient to sustain bankrupcy proceedings against the firm.

Where, within four months prior to bankruptcy, an insolvent retail merchant, with intent to hinder, delay and defraud creditors, hurriedly sells his entire uninventoried stock of goods for less than cost, it has been held, In re Knopf, 17 Am. B. R. 48, that the buyer who made no inquiry as to the pecuniary condition of the vendor, will not be protected as a bona fide purchaser, though he paid for the goods and was innocent of any intentional participation in the vendor's fraud upon his creditors.

An increase of a bankrupt's estate, as a net result of the transactions between him and a creditor within the four months period, where the last transaction was a payment on account of the indebtedness, is held, In re Watkinson, 17 Am. B. R. 56, not sufficient to relieve the creditor from surrendering this payment as preferential before he is permitted to prove the balance of his claim, when the account runs far back of the four months period, and the transactions end with a large payment on account of the whole indebtedness. In such circumstances, it is a preference which must be surrendered before the balance of the account of the creaditor can be proven.

GAME LAW.—The game laws of Arkansas has again been construed by the Supreme Court of that state in Wells-Fargo Express Co. v. State, 96 Southwestern Reporter, 189, in which the express company was prosecuted and convicted for receiving a shipment of game for transportation in packages marked as containing furs. The court holds that the fact that the express company had no knowledge as to the contents of the packages was not a defense. They also hold that shipments beyond the state may be properly covered by a state law in view of acts of congress giving this authority.

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Court of Common Pleas No. 2, ALLEGHENY COUNTY.

HEPPENSTAL v. TRETHEWEY & CO., LTD.

Limited partnership—Demand for election as partner—Sufficiency of.

A, the purchaser of 20 shares in a limited partnership, demanded in writing that the company issue a certificate to him for two shares and to X for 18 shares and that they both be elected to the partnership. This was not done. Held, on motion to appoint an appraiser to fix the value of the stock that the demand for election was not sufficient under the statute.

No. 976 October Term, 1906.

Opinion by SHAFER, J. Filed November 27, 1906.

The proceeding is an application for the appointment of an appraiser to fix the value of shares of stock in the defendant company alleged to be owned by the petitioner, on the allegation that the defendant company had refused to elect the holders of the stock as members of the company, and that the parties had failed to agree upon the value of the stock. The petition shows that the defendant company is a joint stock association under the acts relating to joint stock associations, commonly called limited partnerships. There appears to be no question from the pleadings and evidence that the petitioner, Heppenstal, became the owner in April, 1906, of twenty shares of the capital stock in this company. The petition alleges that after he became such owner, he requested the company that "the holder or holders of the said twenty shares of stock" should be elected to membership in the company; that this the company refused to do. The evidence shows that on June 19, 1906, Heppenstal wrote to the defendants tendering them a certificate for 20 shares of stock issued in the name of Samuel Humphreys and "duly assigned to him by his wife, Jane Humphreys, as executor and sole heir, and I hereby demand that you issue a certificate to me for two shares of said stock and a certificate to E. P. Young for 18 shares of said stock, and that both Mr. Young and myself be elected to partnership in the said Samuel Thethewey & Company, Limited." He then proceeds to say that if this request is not complied with before June 29th, he would require an accounting in accordance with the act. The act of 1885, P. L. 182, provides for the appointment of an appraiser in case of change of ownership not followed by election to membership, and in default of an agreement as to the price. A demand for election into the partnership is therefore a condition precedent to the appointment of an appraiser. The demand in this case was made by C. W. Heppenstal alone; it was not merely a demand that *he* be elected, but was coupled with a demand that another person, who from the demand itself appeared not to be an owner of any stock, should be elected along with him. It did not appear that this person was willing to become a member, or that he had any stock or any interest in any stock in the company. We are clearly of opinion that the refusal of this demand was not a refusal to elect the petitioner a member of the company. It is argued that he ought to have been elected at least as to the two shares for which he demanded an election for himself, but his demand was single; as was said in the case of *Carter* v. *Oil Company*, 200 Pa. 586, in regard to a number of shares acquired at different times by the same person "that the association could accept or refuse it but could not split it up into fractions and accept part and refuse part." The company was plainly not bound to elect Mr. Young under the information given them as to the ownership of the shares, and if they had elected the petitioner for two shares, he might well say "I asked to be made a partner along with Mr. Young, but not without him." We deem it unnecessary to consider whether the parties have sufficiently undertaken to agree as to the price of the shares.

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The petition is therefore refused.

For plaintiff, *Dalzell, Fisher, Young & Hawkins.*

For defendant, *H. Fred Mercer.*

(Common Pleas No. 2, Allegheny Co.)

HARRIS v. INGERSOLL.

Oral contract—Varying written agreement—Affidavit of defense—Reason for omission from written contract.

In a suit to recover purchase money for assignment of a lease the affidavit of defense alleged that plaintiff verbally agreed to procure a three-year extension of the lease but did not allege any reason for the omission of this stipulation in the written agreement. Held insufficient.

No. 1012 July Term, 1906. Sur rule for judgment for want of sufficient affidavit of defense.

Opinion by SHAFER, J. Filed September 28, 1906.

The action is assumpsit for the purchase money of a lease. The plaintiff and defendant agreed in writing under date of February 20, 1906, that the plaintiff should on or before the first of April, 1906, assign to the defendant clear of all incumbrances all his interest in a certain lease then held by the plaintiff from one, Sarah J. Minor, which lease had two years to run from April 1, 1906, for the sum of $8,250, $2,000 at the time of signing the agreement and the balance on the first of April, 1906, on delivery of the premises. The party of the first part also bound himself to procure the consent of the owner of the property to be given to the transfer. The affidavit of claim shows the payment of the $2,000 at the time of the execution of the contract; that the plaintiff thereafter procured the consent of the lessor to the transfer; that he tendered a written assignment of the lease from March 31, 1906, and tendered possession of the premises; that the defendant promised from time to time to carry out the contract and on May 29, 1906, paid $750 additional on the purchase money, but afterwards refused to pay any more money and to carry out the contract. The defendant alleges that it was a part of the terms of the contract between the parties that the plaintiff should procure from the owner of the premises an extension of the lease for at least three years longer than the term held by him at a rental of $5,000 per year or less, and that the purchase money of $8,250 was for the unexpired term and also for the extension and that upon the strength of plaintiff's statement that he would do so, defendant was induced to sign the agreement and that the plaintiff has not procured an extension of the lease. Defendant admits that he paid $750, but says it was not paid for the purpose of inducing the plaintiff to refrain from bringing an action against him. It is not alleged by the defendant that the omission from the contract of so highly a material part of it was brought about by fraud, accident or mistake, and his payment of $750 a month after the tender and refusal is entirely unexplained, if his account of the matter be correct.

We are of opinion that, in the absence of a reason for the omission of so important a provision as the procuring of three more years in addition to a two years' lease when in the same instrument the plaintiff agrees to procure from the same lessor consent to the assignment of the lease he already had, the defendant must be held to his written contract and the rule is therefore made absolute.

For plaintiff, *O. S. Richardson* and *W. D. N. Rogers.*

For defendant, *Burleigh, Gray & Challener.*

(Common Pleas No. 2, Allegheny Co.)

COMMONWEALTH v. CHALFANT

Bond—Condition—Forfeiture.

A bond conditioned to appear at Quarter Sessions Court to answer any indictment found is not forfeited for failure to prosecute an appeal from a summary conviction before a justice.

No. 246 July Term, 1906. Sur rule for judgment.

Opinion by SHAFER, J. Filed November 14, 1906.

The action is assumpsit on fourteen several bonds each in the penal sum of $50, signed by defendant. The plaintiff has an-

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nexed to his affidavit of claim only one of the bonds, but avers that the others are exactly in the same form and words, except that each of them is made by a different principal. In the case of the bond, a copy of which is given, the condition is "that the said F. F. Morehead shall be and appear at the —— term of court of Oyer and Terminer and Quarter Sessions for the county of Allegheny on the first Monday of ——, 190—, at the city of Pittsburgh, then and there to answer the above charge of desecrating the Sabbath day, as may be preferred against the said F. F. Morehead, and shall abide and not depart the court without leave." It appears from the affidavits of claim and defense that the fourteen principals in these bonds had been arrested and brought before J. Clyde Miller, a justice of the peace, for whose use in part this action is brought, and convicted before him of unlawfully working on Sunday, and were each fined $25 and costs; and that the bonds in question were given in some way upon the proceedings in that case. The breach now alleged is that the principals in each of the bonds did not take an appeal to the Court of Quarter Sessions, and did not appear in the quarter sessions, or pay their fines and costs, nor did Henry Chalfant produce them though requested so to do.

It was no doubt the intention of the magistrate to have a bond from these parties to pay their fines or take out an appeal to the quarter sessions, but the bond itself contains nothing to that effect, but is the ordinary bond requiring the parties to appear to answer any indictment that may be made against them at the next term of court; but it is not admitted that any such mutual mistake was made, or that the defendant understood the bond otherwise than as it is written.

The rule must therefore be discharged.

For plaintiff, *J. B. McAdoo* and *W. T. Treadway.*

For defendant, *F. P. Sproul.*

A saloon keeper is held, in Peter Anderson & Co. v. Diaz (Ark.) 4 L. R. A. (N. S.) 649, not to be liable for a personal injury to a patron by the bartender and others, who put alcohol on his feet and set it afire.

Court of Common Pleas,

CRAWFORD COUNTY.

HIME v. MEADVILLE.

Arbitration—Appeals—Award.

A person who takes a rule to arbitrate has no standing to appeal from an award against him.

No. 25 February Term, 1906. Sur rule to show cause why plaintiff should not be allowed an appeal from award of arbitrators without paying costs.

Opinion by THOMAS, P. J. Filed July 16, 1906.

It is maintained that the plaintiff, having presented her petition, in which she sets forth that she is unable to pay costs and has no property, should be allowed to take this appeal without costs. Objection is interposed on the ground that the petitioner was the person who took the rule to arbitrate and the award was against her, consequently she is not entitled to an allowance of this appeal. In reply to this it is urged that she is entitled tled an appeal notwithstanding the act of assembly, but under the statute of 2d Henry VII, c. 12, Roberts's Digest, pp. 116, 117.

We are not persuaded that the English statute would cover a case of this character, but even if it did there are other difficulties in the plaintiff's way. This application is made specifically under the act of assembly, and the act only permits an appeal of this character by a party against whom the rule of reference shall have been taken. The act does not cover this case, as the plaintiff is the party against whom the award is made, and is also the party who took out the rule of reference. Another difficulty that lies in the plaintiff's way, which might possibly be overcome, however, is that the truth as to the statements of poverty contained in the petition have not been verified.

No answer was made admitting these facts, no service was had of the petition upon the opposite party, and no testimony has been taken to establish the same. Such facts should be established to the satisfaction of the court, and this is not done merely upon petition.

Being of opinion that the act under which the plaintiff has applied does not permit of

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an appeal in this case, and also that there is no other enabling statute permitting the same, the rule is discharged.

For plaintiff, *M. C. Powers.*

For defendant, *J. P. Colter.*

[From J. D. Roberts, Esq., Meadville. Pa.]

Court of Quarter Sessions,

ARMSTRONG COUNTY.

COMMONWEALTH v. BUTLER.

Criminal law—Practice (Q. S)--Information. Indictment—General verdict.

A prisoner who has entered bail cannot complain after indictment found that the information upon which the indictment was found was insufficient.

Where an indictment contains several counts, one of which is good, a conviction is good as to that, although the verdict is general.

No. 32 June Term, 1906. Sur rules to show cause why new trial should not be granted, and in arrest of judgment.

Opinion by THOMAS, P. J., specially presiding.

Upon argument of these rules, Aug. 22, 1906, we entered of record an order discharging the same, and that our reasons for so doing would be filed later. In pursuance thereof we hereby order this opinion filed nunc pro tunc as of Aug. 22, 1906.

While the information was not in accordance with proper practice and was not sufficient to have detained defendant in custody, had advantage been taken thereof at the proper time, yet it is clear that, after having given bail for appearance at court, and an indictment having been found thereon, the defect cannot be taken advanage of on motion to quash or in arrest of judgment. *Com.* v. *Mallini*, 214 Pa. 50; *Com.* v. *Dingman* 26 Sup. Ct. 615; and *Com.* v. *Brennan*, 193 Pa. 567.

The amendment of the indictment was unnecessary, as the same was as to surplusage, and was properly allowed, though unnecessarily made. *Penna.* v. *John Bell*, Add. Rep. 156; *Com.* v. *Kay*, 14 Sup. Ct. 376.

The indictment contained several counts, but evidence was offered as to but one, which was sufficient, and the only one that we submitted to the jury for their consideration. There being one good count the conviction was good as to that, though the verdict was general. *Hazen* v. *Com.* 23 Pa. 355; *Stahl's Ap.*, 1 Sup. Ct. 496; *Com.* v. *Bradley*, 16 Sup. Ct. 563; *Com.* v. *Prickett*, 132 Pa. 371; *Com.* *Bennett*, 1 Pitts. 261.

There are no sufficient reason assigned, either for the granting of a new trial or arrest of judgment, and the rules are discharged.

For plaintiff, *Fullerton, Buffington & Culbertson.*

For defendant, *Christy, Reyborn & Golden.*

[From J. D. Roberts, Esq., Meadville, Pa.]

WITNESSES. (PRIVILEGE OF WITNESS—IMMUNITY FROM PROSECUTION.) WIS. SUP. CT.

The case of State v. Murphy, 107 N. W. 470, contains a construction and application of a comparatively recent statute of Wisconsin which had not previously been presented to the court in exactly the same way. The statute declares that a witness in an action by the state involving the official conduct of any officer thereof shall not be excused from testifying on the ground that his testimony may expose him to prosecution, but that he shall not be prosecuted on account of any transaction concerning which he may testify. The defendant was an alderman of a city and was charged with soliciting and accepting a bribe as an inducement to vote in favor of an ordinance allowing a certain person to lay a sidetrack across a street in the city. He pleaded in bar immunity from prosecution on the ground that prior to the filing of the information he had testified before a grand jury as to the transactions alleged in the information. The clerk of the grand jury produced his minutes showing that accused testified that he knew of no alderman demanding or receiving money to support any contract, special privilege or franchise. Defendant testified that he was asked as a witness before the grand jury if he had received any money for his vote on special privileges of certain varieties, and that he answered the question, no. Upon this state of facts the court declares that defendant did not testify before the grand jury concerning the transaction for which he was prosecuted and hence was not within the immunity provision of the statute. The substance of the court's reasoning merely is

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that the statutes would be rendered wholly nugatory and unenforceable if the mere fact that a person who was called before the grand jury and gave no evidence excepting protestations of innocence and ignorance were thereafter to be held immune from prosecution for the offense which the grand jury was investigating.—*The Green Bag.*

CORPORATIONS. (FOREIGN PRACTICE.) MISSOURI.

The attempt of the state of Missouri to obtain sufficient information as to the methods of the Standard Oil Company on which to found a prosecution for violation of the anti-trust act of that state has given rise to a decision as to the validity of a portion of the statute which it seems has not been passed upon before. State v. Standard Oil Company of Indiana, 91 Southwestern Reporter, 1062. That part of the statute which provides that when the attorney-general in proceedings against a corporation under the anti-trust law files in court a statement giving the names of the non-resident officers of the corporation whose testimony he desires, the court shall issue a notice to the attorney of record for the corporation notifying him that the testimony of the persons named is desired and requiring him to have them present at the time and place fixed for their examination, is construed as merely providing a means of notifying a defendant through its attorney and declaring that notice to an attorney of record shall be notice to the client and is held to be valid. Foreign corporations doing business in the state are regarded as being bound by the provisions of this statute on the principal that a state may prescribe the conditions on which a foreign corporation may do business therein, and that where a foreign corporation comes into the state for business purposes pursuant to the terms prescribed by the legislature a contract binding the corporation to obey existing laws is implied, and that therefore with respect to this particular statute, foreign corporations must be regarded as having agreed that notice to their attorneys under the statute shall be notice to them.—*The Green Bag.*

TRANSFER AND INHERITACE TAX.—The doctrine that the right to take property by devise is a creature of law and not a natural right is repudiated by the Supreme Court of Wisconsin in the case of Nunnemacher v. State, 108 Northwestern Reporter 627. Judge Winslow, for the majority, admits that the contrary proposition has been stated by a great majority of the courts of this country, including the Supreme Court of the United States, and adds that "the unanimity with which it is stated is perhaps only equalled by the paucity of reasoning by which it is supported." But though the court holds as above, it is nevertheless of the opinion the principle of inheritance taxation may be justified under the power of reasonable regulation and taxation of transfers of property. In a separate concurring opinion Judge Marshall waxes eloquent in his approval of the repudiation of the doctrine above referred to, and his opinion is well worth reading on this point.

TRADE-MARKS AND TRADE-NAMES.—The Supreme Court of Michigan in Warren Bros. v. Barbar Asphalt Paving Co., 108 Northwestern Reporter 652, holds that where a city calls for proposals for the construction of "Bitulithic" pavement, and requires the pavement to be made according to certain specifications, a company might be awarded the contract for the work, although another company has habitually used the word "bitulithic" as a name for the particular pavement made by them, and had had this trade-name registered and also filed for record as a trade-name in the office of the Secretary of the State of Michigan. The court says that injunction must be denied because a trade-name does not give one the exclusive right to make or sell a given kind of goods, the trade-name being simply to point out the origin or ownership of the article to which it is affixed for protection of the consumer, and that in cases where the rights to the use of a trade-name are invaded the wrong consists in the sale of goods of one manufacture under the false representation that they are the goods of another.

A quitclaim deed is held, in Hall v. Waterman (Ill.) 4 L. R. A. (N. S.) 776, to be good color of title for adverse possession.

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REGULATION OF HOURS OF LABOR. The Oregon law regulating the employment of women in factories, etc., and prohibiting work for more than ten hours a day, was before the court in State v. Miller, 85 Pacific Reporter, 855. The court concedes that the right to contract is a conditional guaranty which cannot be arbitrarily interfered with by the legislature, but maintains that the fourteenth amendment to the federal constitution was not intended to limit the police power of the state, and that reasonable regulations for the promotion of the welfare, morals, and good order of the people were not in conflict with this amendment. In sustaining this enactment as a reasonable exercise of the police power, the court follows Massachusetts, Nebraska, and Washington, and dissapproves of the contrary holding in Illinois.

ADVERSE POSSESSION.—A point which the court says is in accord with the unbroken current of authority, but nevertheless is of sufficiently rare occurence to justify giving it notice, is contained in Garst v. Brutschke, 105 Northwestern Reporter, 452, where it is declared that where a person executes a deed which by mistake conveys certain land not intended to be conveyed, and after the record of the deed pays taxes on the land and fences it so as to include it with an adjoining field, this does not constitute an adverse possession, entitling the grantor to hold the land either as against the grantee or a subsequent purchaser from him.

ENJOINING INTERFERENCE WITH BUSINESS. Van Der Plaat v. Undertakers' & Liverymen's Ass'n of Passaic County, 62 Atlantic Reporter, 453, indicates that though injunction may be resorted to to prevent a suitor being forced out of an established business, it cannot be resorted to to enable him to force himself in. Complainant, who was educated as an embalmer and undertaker, and desired to engage in that business but was prevented from doing so by the fact that dealers in supplies and owners of hearses would not sell or rent to him except for higher prices than were charged to the members of the association, was denied relief on the ground that he had no established business which the injunctive process could be used to protect.

The probable accretions of wealth to the husband are held, in Muir v. Muir (Ky.) 4 L. R. A. (N. S.) 909, proper to be considered as a basis for alimony.

Authority to employ a detective to investigate the affairs of a corporation is held, in Thiel Detective Service Co. v. McClure (C. C. A. 6th C.) 4 L. R. A. (N. S.) 843, not to be conferred by power of attorney, given by a stockholder, to do all that he can do relating to the stockholder' speisonal business and estate.

A recognizance given in a criminal proceeding, conditioned for the appearance of the accused before a circuit court on the first day of a certain term thereof, and that he will not depart thence without leave of the court, is held, in State v. Dorr (W. Va.) 5 L. R. A. (N. S.) 402, to be forfeitable only upon calling the accused upon the recognizance at some time during the term, and, if he fails to appear, by entering his default of record.

A bank which takes over the assets of a liquidating bank upon an agreement that it will pay its debts and a certain sum to each shareholder is held, in Exparte Savings Bank (S. C.) 5 L. R. A (N. S.) 520, to assume towards creditors the trust relation held by the transferrer, and the creditors of the latter are held to have a prior lien on the assets so transferred in case the transferee becomes insolvent before completing its undertaking.

The Supreme Court of the United States has recently handed down an important decision in the case of State of New Jersey v. Anderson, 17 Am. B. R. 63, holding that the annual license fee, or franchise tax, required by the statute of New Jersey to be paid by corporations upon their outstanding capital stock, for the privilege of existence and the continued right to exercise their franchises is a "tax" within the meaning of section 64a of the Bankrupcy Act, 1898. Section 64a specifically obliges the trustee to pay all taxes legally due and owing by the bankrupt, without distinction between the United States and the State, county, district or municipality.

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EDWARD B. VAILL, THOMAS EWING, } EDITORS.

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PITTSBURGH, PA., MARCH 13, 1907.

District Court, United States,

WESTERN DISTRICT OF PENN'A.

In the Matter of E. D. R. BROWNE, Bankrupt.

Bankruptcy—Acts of bankruptcy—Amendment of petition—Petitioning creditors.

A debtor whose business was being run under the supervision of his creditors, sold certain property and used the proceeds either for payment of a creditor or for furtherance of his affairs against the spirit of the agreement with his creditors. Held, that there was an act of bankruptcy under the clause prohibiting the conveyance, concealment, etc., of property with intent to delay and hinder creditors.

A petition to have a debtor declared a bankrupt may be amended so as to cover acts of bankruptcy which develop in the evidence.

Creditors who have received payments within four months, in the regular course of business may be petitioners to have the debtor declared bankrupt.

No. 3370 in bankruptcy.

Opinion by EWING, J. Filed February 16, 1907.

On October 25, 1906, an involuntary petition in bankruptcy was filed against the said Browne by three of his creditors, the Pittsburgh Plate Glass Company, Sturm & McKimm and Stinson-Kennedy Company. On November 9, 1906, said Browne appeared and denied that he committed the act of bankruptcy set forth in the petition, or that he is insolvent, or that the petitioners have provable claims against him, and demanded trial by jury. On December 11, 1906, he withdrew his demand for a trial by jury and the matter then came before the court for hearing and determination.

The act of bankruptcy alleged in the petition is that the said bankrupt "did heretofore, to wit, on the 20th day of October, 1906, transfer while insolvent a portion of his property to one of his creditors with intent to prefer such creditor over his other creditors, in that he did, heretofore, to wit, on the 20th day of October, 1906, transfer while insolvent a portion of his property consisting of the sum of one hundred and sixty-five dollars ($165) to Thomas C. Pitcairn, Esquire, one of his creditors, with intent to prefer said Thomas C. Pitcairn over his other creditors."

The testimony taken at the hearing developed the following facts: The said bankrupt was engaged in conducting a restaurant in the city of Pittsburgh and was indebted to an extent of something over $8,000. About September 12, 1906, his creditors seem to have become uneasy about his financial condition, and held a meeting with the said Browne, at which meeting it was agreed that henceforth the creditors should have supervision over his business, receiving the cash proceeds therefrom and applying the net proceeds towards the payment of their respective debts, the payment to amount to about 40 per cent the first year and 60 per cent the second. Pursuant to this agreement three of the creditors were appointed a committee to look after the matter in behalf of the creditors. An arraignment was made with Browne by which he was to conduct the business as theretofore, receiving as compensation for his service $20 per week. A member of the creditors' committee was delegated to receive the receipts from the business daily and pay therefrom the expenses. This arrangement continued until about the date of the filing of the petition in bankruptcy and during that period no substantial profit was realized from the business, the total amount having been paid over for the benefit of the creditors being $139.86, but the rent of the premises had not been paid so it seems that really the business just about paid its expenses.

Just prior to the filing of the petition the creditors discovered that Browne was disposing of some of the personal property, furniture, cash register, etc., and upon calling upon him for an explanation of such

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conduct against the protest and without the consent of the creditors, were given to understand that he had realized from the sale of such property $185, and had applied $165 of it to the payment of a note against him held by one Thomas C. Pitcairn, which item of indebtedness was not embraced in the list he had made for the creditors at the time of their meeting in the previous September. It was in consequence of this act that the petition was filed and the allegation of bankruptcy therein contained made.

Within four months prior to the 25th of October, two of the petitioning creditors had received payments from Browne on account of his indebtedness to them, one the sum of $50 on a note and the other $30 on an account.

The number of Browne's creditors exceeds twelve and, as before stated, three signed the petition.

Browne admits the disposition of his property from which he realized $185 as aforesaid, and that he gave the creditors, when they questioned him about it, to understand that he had paid $165 of that to Pitcairn, but he now denies such payment to Pitcairn, testifies he paid him no amount whatever, that he was simply bluffing his creditors when he gave them to understand the contrary, and that the money was applied partly for maintenance of himself and family and partly towards the payment of some of the employes of the restaurant, whom he alleges the creditors had failed to pay. The creditors, on the other hand, contended they paid all the employes of the restaurant up to the time when they abandoned supervision of his affairs and resorted to this bankruptcy proceeding.

It also appears that about three days before this petition was filed a landlords' warrant for the unpaid rent was issued.

The three questions then that arise are:

First, Whether at the time of the disposition of his property to the amount of $185 as aforesaid, the said Browne was insolvent;

Second, Whether he applied a large portion of that money to the payment of his obligations to Pitcairn, as alleged in the petition;

Third, Whether the petitioning creditors who received payments from Browne within four months prior to the filing of the petition have such provable claims as entitle them to file such petition.

The testimony regarding Browne's financial condition at the time he disposed of that property consists of his own sworn statement that the restaurant with its furniture and appliances, with the leasehold and good will of the business were worth the sum of $10,000, and the testimony of one E. H. McMurray, engaged in a similar business, to the effect that he had carried on negotiations with Browne about that period and was contemplating the purchase of his business for the sum of $10,000, his estimate of its value being given at that amount, providing the extent of the business was as Browne had stated it to him. The creditors who had charge of the restaurant during the period of their supervision testified that the receipts and expenses were just about equal. From the accounts kept by this committee it appears that the restaurant averaged about $50 gross receipts per day for the week days, omitting Sunday.

What would be a fair valuation for a business equipped and in running order as this was at that time is somewhat problematical, and the most that can be said upon that point is that the testimony leaves one in a rather unsatisfactory state of mind as to whether or not the fair valuation of it would exceed the admitted liabilities of Browne. However, the actual determination of that question, as we view the case as it stands, is not now necessary.

Upon Browne's testimony in regard to the use he made of the proceeds of the portion of his property of which he disposed, it would appear that he did not apply it as alleged in the petition, for there is no direct testimony in the case regarding that point other than his own. It might be a question whether or not since he admits having given his creditors to understand that the payment to Pitcairn had been made by him, he would not be estopped now from denying that fact, but as some act of bankruptcy satisfactorily proven or admitted seems to be necessary for an adjudication, it were better perhaps not to insist on the question

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of estoppel. That might be adjudged sufficient under the facts in this case and might not.

But that Browne disposed of that portion of his property against the protest of his creditors and contrary to the spirit of the agreement made between them about September 12th, it would seem that his act in so doing would bring him within the provisions of another clause of the bankrupt act, viz: that of "conveyed, transferred, concealed or removed, or permitted to be concealed or removed, any part of his property with intent to hinder, delay, or defraud his creditors, or any of them." If that be the case this would seem to be a proper case in which to permit an amendment of the petition making that allegation of bankruptcy instead of the other, since the creditors were misled entirely and admittedly so by the representations made by the alleged bankrupt to them.

If this is done the question of Browne's insolvency at that time is unimportant, and upon a proper application setting forth fully all the facts showing the occasion of the former allegation of bankruptcy and the reason for the desired amendment, the court would be disposed to permit it to be made.

As to the competency of the petitioning creditors in view of the payments made to them within four months prior to the filing of the petition as aforesaid to be parties to said petition, I would be disposed to hold that they had provable claims within the spirit of the bankrupt act and for the purpose of joining in such petition if called upon to determine that question without the light of any authorities thereon. And indeed, even with the existence of those authorities my inclination is in that direction, for it seems to me the courts have confused the terms "provable" and "allowable" in passing upon that question.

The bankrupt act provides in clause B of sec. 59 that: "Three or more creditors who have provable claims against any person which amount in the aggregate, in excess of the value of securities held by them, if any, to five hundred dollars or over . . . . may file a petition."

In clause B of sec. 55 that: "At the first meeting of creditors the judge or referee shall preside, and, before proceeding with the other business, may allow or disallow the claims of creditors there presented."

In clause C of sec. 57 that: "Claims after being proved may, for the purpose of allowance, be filed by the claimants in the court where the proceedings are pending," etc.

In clause D of the same sec. that: "Claims which have been duly proved shall be allowed, upon receipt by or upon presentation to the court, unless objections to their allowance shall be made by parties in interest," etc.

In clause G of the same sec. that: "The claim of creditors who have received preferences . . . . . shall not be allowed unless such creditors shall surrender such preferences."

It is under this last clause that the contention is made that the two creditors aforesaid are not entitled to join in the petition in this case.

All these clauses indicate to my mind a decided difference between the words "provable" and "allowable." Provable means "that may be proved," and a creditor of a bankrupt who has received a merely voidable preference and retained the same and is deprived thereof by the judgment of a court in a suit by the trustee can thereafter prove the debt so voidably preferred: *Keppel* v. *Tiffin Savings Bank*, 197 U. S. 356. And clause G of sec. 57, it is seen provides only that the claims of creditors who have received preferences shall not be allowed, not shall not be proved, and this is the clause upon which the alleged bankrupt relies in this instance.

I admit that the authorities seem to construe the two words as identical in meaning, but I know of no case in which the question is squarely decided.

Now the payments that were made to these petitioning creditors were made some little time prior to any difficulty between the creditors and Browne in regard to his financial condition and in the ordinary course of business and as far as appears from the testimony the creditors had at that time no reason to believe that he was insolvent and he himself, as we have seen, still contends that he was not insolvent even at the time the petition in bankruptcy was filed. At most these preferences were merely voidable,

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so far as appears, and under the authority above cited their claims could be proven even after a contest with the trustee regarding their right to retain such preferences.

I therefore conclude that the alleged act of bankruptcy stated in the petition has not been established by the testimony, but that, for the reasons I have already given, I would be disposed to allow an amendment in that respect, if the petitioning creditors after consideration are disposed to ask for it. The question of the insolvency of Browne at the time of the disposition of his property then becomes of no moment. And my inclination is to hold that the petitioning creditors who received payments from Browne within four months prior to the time of the filing of the petition in this case are, under the circumstances, competent as such petitioning creditors and that they have provable claims within the meaning of the bankrupt act. But I suggest that there may be very considerable doubt as to the correctness of this view and that the creditors should give the question careful consideration. I also suggest to them the question or not, if they see fit to file an amended petition, it may not possibly be better to include in their other petition creditors to whose competency for that purpose the same objections may not be made; or whether, under all the circumstances, it may not be better to abandon this proceeding entirely and start *de nove.*

For the purpose of giving the creditors an opportunity for the consideration of the suggestions herein made no decree will be entered in this case before the 22d inst., on or before which date the creditors will be expected to determine what course they wish to pursue. In the absence of any action on their part a decree will be made dismissing the proceeding.

For petitioner, *George E. Reynolds.*
For bankrupt, *L. C. Barton.*

A present contract of insurance is held, in Whitman v. Milwaukee F. Ins. Co. (Wis.) 5 L. R. A. (N. S.) 407, not to be effected by signing an application, followed by the statement of the agent that he would "see to it, take care of it, so it would be all right," would "get a policy."

Court of Common Pleas No. 1,

ALLEGHENY COUNTY.

METHODIST EPISCOPAL CHURCH v. McFARLAND.

Church elections—Property—Trustees—Office of treasurer.

By a church charter it was provided that to the trustees and their successors in office, according to the form of discipline by which said church is governed, be given the care and management of the property of the corporation, and the said trustees should be members of the corporation. It was also provided that every male member in full communion—twenty-one years of age and upwards, having resided in the city of Pittsburgh or its vicinity six months, being a citizen of Pennsylvania, should be a member of the corporation.

In 1903, the defendant and two others were elected trustees and the defendant also elected treasurer. At this time the property of the church had been sold and these three were the only members. Shortly thereafter defendant withdrew from the church. In 1905, the other two trustees, being the only remaining members, elected themselves trustees, and also president and treasure.

Upon bill in equity filed by them in the name of the church to compel the defendant to turn over church funds in his hands by virtue of his office of treasurer it was held,

First, The defendant by withdrawing from membership and becoming a member of another church was no longer a trustee.

Second, Having acted as treasurer only because of his being a member and his election as trustee his right to hold that office also terminated.

Third, The election of 1905, was illegal but the trustees so elected held over by reason of their former election and are the proper custodians of the money and property of the church.

No. 243 September Term, 1905.

Opinion by MACFARLANE, J. Filed January 11, 1906.

FINDING OF FACTS.

1. The Methodist Episcopal Church of the city of Pittsburgh, Liberty street station, was incorporated by the Supreme Court of the state on October 6, 1838, and the charter is recorded in the office of the secretary of th

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commonwealth in charter book No. 6, p. 279. To the trustees "and their successors in office, according to the form of discipline which said church is governed" was given the care and management of the property of the corporation, and it was provided that they should be members of the corporation. It was also provided that every male member in full communion in the church, twenty-one years of age and upwards, having resided in the city of Pittsburgh or its vicinity six months, being a citizen of Pennsylvania, shall be a member of the corporation, with the privilege of voting at its meatings, and power was given to the corporation to make by-laws, but none such were adopted.

2. The discipline of the Methodist Episcopal Church provides, in chapter III. sections 299 and 300, that each board of trustees of church property shall consist of not less than three nor more than nine persons, all of full age, and two-thirds of whom shall be members of the church, and that where the law of the state fixes the mode of election, the qualifications of voters and of trustees or any other matters pertaining to the election, its requirements are to be carefully observed. It was also provided, in section 302, that in churches where the law of the state does not fix the mode of election the trustees shall be elected annually by the fourth quarterly conference of the charge, and in case of failure to elect at the proper time, a subsequent quarterly conference may elect, and that all the trustees shall hold their office until their successors are elected.

3. For the past forty-six years the trustees were never elected at a meeting of the corporation, but were chosen at a meeting of the fourth quarterly conference, which was in effect, a meeting of the male members of the church of full age, held four times in each year. At a meeting held in the year 1903 defendant, W. W. Phillips and Joseph Hamilton were elected trustees, and the defendant was elected treasurer.

4. At that time the property of the church had been sold, and the three above named were the only members, the organization being continued and a pastor appointed for the purpose of closing up the business of the corporation.

5. The defendant on November 29, 1903 withdrew from said church and united with another church in the city of Allegheny.

6 At that time he held, and continues to hold, in his possession $1000, with some accrued interest, and possibly a small balance in addition, being part of the proceeds of the sale of the Liberty street station church, these funds being retained by him as treasure of the church. He also holds the seal of the corporation.

7. In February, 1905 there were but two remaining members of the church, the above named Hamilton and Phillips, and at a quarterly conference at which the pastor and these two gentlemen were present, these two members elected themselves trustees, one of them being chosen president and the other secretary and treasurer, and they passed a resolution requiring the defendant to deliver all moneys, papers, books, seal of the corporation, etc., belonging to the Methodist Episcopal Church of the city of Pittsburgh, Liberty street station, in his possession to the new treasurer of the board, Joseph Hamilton. This the defendant, after due notice, declined to do, contending that the new board of trustees was not legally chosen, and that the said Hamilton was not entitled to receive the money, papers, etc.

8. The defendant also claimed that the sum of $1000, should not be paid by him to Mr. Hamilton for the further ground that this amount had been withheld from the proceeds of the sale of the church (the balance having been paid to the general conference), and that it was a bequest held by the trustees under the terms of the will of Tomas R. Holmes, deceased, recorded in Will Book Vol. 9, page 335 in the Register's Office of this county, which will is made a part of these findings. The clause referred to is as follows:

"I give and bequeath to the trustees of the Methodist Episcopal Church of Liberty street, on the corner of Liberty and Hay streets, the sum of one thousand dollars, to be permanently invested by said trustees and the annual income thereof applied and expanded under their direction in the purchase of refreshments for the Sunday School scholars of said church on the fourth day of July of each and every year forever."

The sum of $1000 had been withheld, as

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above claimed, out of the proceeds of the sale by direction of the board of trustees, but we do not now pass upon the question of fact whether it was for the purposes of the trust under the Holmes' will.

9. The said church is a regular charge of the Pittsburgh conference of the Methodist Episcopal Church and has assigned to it a minister by said conference. It has not owned any property for at least three years, other than the money in defendant's possession.

CONCLUSIONS OF LAW.

1. The defendant by withdrawing from membership in the Liberty Street Church and becoming a member of another church was no longer a trustee of the Liberty Street Church.

2. Having been chosen treasurer by the trustees and acting as such only by virtue of his being a member of the board his right to hold the office of treasure also terminated.

3. The election of February, 1905, was illegal.

4. W. W. Phillips and Joseph Hamilton are trustees of the church by reason of their former election, and they are the proper custodians of the money and property of the church.

5. A decree should be made in accordance with these conclusions.

OPINION.

Upon an accounting by the defendant the exact amounts held by him can be determined. We think it immaterial whether the $1000 is to be used for the purposes of the Holmes' bequest or not, for in our opinion, the defendant is no longer a trustee of the church, and the remaining two members hold office until their successors are elected, and are therefore entitled to the custody of all funds belonging to the church. The death or removal of the members of the church does not constitute a dissolution of the corporation, nor does the fact that there are less members than the charter requires invalidate the acts of the corporation: *Cook on Corporations*, Sec. 631; *Commonwealth* v. *Cullem*, 13 Pa. 132.

It is manifest that the remaining trustees must take some action to dispose of the remaining assets, and the question as to the disposition will have to be settled hereafter; but whatever be the nature of the fund, it must be placed in the hands of the proper parties.

It is but just to the defendant to state he has acted conscientiously in the matter in the belief that the last election was invalid and that the fund should be preserved until the question be determined as to its disposition under the Holmes' will. We think the law is against him, but as the case now stands we think the costs should be paid out of the fund.

For plaintiff, *Kinnear, McCloskey & Best.*
For defendant, *Cox & Johnston.*

CONSTITUTIONAL LAW. (EQUITY JURISDICTION.) N. J.—The validity of a rather novel statute was questioned in Mayor, etc., of Borough of Metuchen v. Pennsylvania Railroad Co., 64 Atlantic, 484. By Public Laws, New Jersey, 1903, p. 660, section 29, it is provided that if a railroad company shall neglect to construct and maintain bridges or highway crossings properly, as required by law, it shall be lawful for the governing body of a township or municipality to proceed by suit in equity to compel the specific performance imposed by law, and the court shall prescribe the crossing to be constructed or the repairs to be made. This section, it was contended, was unconstitutional on the ground that the legislature has no power to confer on the court the right and power to give to a municipality compulsory remedy by way of compelling specific performance, by a railroad company, of its duties as to the construction and maintenance of highway crossings as contradistinguished from its power to give it a preventative remedy. But the court considered that the question was settled in favor of the validity of the statute by Palmyra v. Pennsylvania Railroad Co., 65 N. J. Eq. 799, 52 Atl. 1132, and Eckert v. Perth, Amboy & Woodbridge Railroad Co., 62 N. J. Eq. 777, 57 Atl. 438, wherein a statute providing for compulsory proceedings to establish gates or bars across a railway was upheld.—*The Green Bag.*

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PITTSBURGH, PA., MARCH 20, 1907.

Orphans' Court,

ALLEGHENY COUNTY.

In re Estate of NATHANIEL B. HOGG, Deceased.

Partnership debts—Trusts.

Where one partner sells his interest to another in consideration of an engagement by the latter to pay the partnership debts, the engagement to pay them is but a personal contract, and the purchaser does not assume a trust relation to the firm creditors.

Partners may, by mutual agreement, as by the sale of one partner's interest to his co-partners, convert the partnership property into individual property.

No. 116 January Term, 1903. Sur petition of Tremont Nail Company.

Opinion by OVER, J. Filed February 28, 1907.

STATEMENT.

The Tremont Nail Company, a Massachusetts corporation, in 1882, instituted a proceeding by attachment against Robert C. Totten and N. B. Hogg, this decedent, both of Pittsburgh, partners doing business as Totten & Company, in the Massachusetts courts, for the purpose of recovering $16,000 damages for an alleged breach of a contract. The defendants appeared by counsel, the cause was continued from time to time until the 8th day of June, 1897, when it was dismissed, and on the 14th day of June, 1897, was reinstated and again dismissed on May 31, 1900; was again reinstated on March 15, 1901, and on September 4, 1901 defendant Totten suggested the death of defendant Hogg, which occured July 21, 1901; then on January 11, 1904, defendant's counsel withdrew his appearance, and on February 10, 1904, Totten was called to come into court and did not appear, and the cause was continued for the assessment of damages; and on the 21st day of June, 1904, the plaintiff amended his writ and declaration by leave of court "by changing the *ad damnun* from $16,000 to $50,000;" and on the 5th of July, 1904, the following decree was made: "It is considered by the court that said The Tremont Nail Company, plaintiff, as aforesaid, recover against said Robert C. Totten, defendant, as aforesaid, the sum of $37,455.18 damages and costs of suit taxed at $272.04. And execution is awarded for the same sums against the goods, effects and credits of the said defendant in his own hands and in the hands and possession of said Edmund M. Wood and Martial F. H. Wood, trustees of said defendant."

The partnership existing between Totten and Hogg was dissolved in 1889, Hogg being the only solvent partner, and the partnership assets were assigned to him, he expending more than their value in the payment of partnership debts. He subsequently organized a corporation under the name of Totten & Hogg Iron and Steel and Foundry Company, with three thousand shares of capital stock of the par value of $50, and turned over to it the property which had been assigned to him by the firm at the valuation of $135,000, receiving therefor 2960 shares of said capital stock. He having died July 21, 1901, testate, letters were issued on his estate to his executors, George A. and Wm. A. Hogg, who sold the 2960 shares of stock of said corporation belonging to the estate for $98,656 and accounted for the same in their first and final account filed December 4, 1902, at No. 116 January Term, 1903. It was duly advertised and confirmed absolutely on January 15, 1903, and came up for audit January 27, 1903, when W. A. Hogg, one of the executors testified *inter alia* as follows:

"We have paid all the debts of my uncle except one claim which is in litigation in Boston. That claim the executors do not admit, it has been pending since 1882 and no judgment has been recovered. Our counsel there advises that it is the best thing to

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do to let it go a little while until it is dropped. We don't recognize it as a claim against the estate."

On March 6, 1903, a decree was made confirming the payments previously made by the executors on account of distribution and distributing the amount in their hands to the widow and legatees, which amounts the executors have paid. W. A. Hogg, one of the executors, died in 1905, and the surviving executor, George A. Hogg, was discharged by decree of court on September 23, 1905.

The Tremont Nail Company filed its petition on February 21, 1906, alleging *inter alia* that Robert C. Totten is unable to satisfy the judgment obtained against him by it, or any part thereof, praying that the decree discharging George A. Hogg, surviving executor be set aside, that the decree of distribution be opened and its claims on the judgment against Totten be allowed as a valid claim against the estate, and that the distributees refund to the executor a sufficient amount to pay said claim. Citation was issued on this petition on all the distributees and answers have been filed by them denying the petitioner's right to the relief prayed for. The cause was heard upon petition and answer.

OPINION.

The petitioner is not entitled to the relief prayed for unless it appears that the estate is legally liable for its claim, and also that the decree confirming payments previously made by the executors and distributing the fund in their hands with which they have complied is not conclusive.

Under the Massachusetts statutes the action brought there against Totten and Hogg abated as to the latter by his death: *New Haven Company* v. *Hayden*, 119 Mass. 361. It was then prosecuted against Totten alone, and the judgment was recovered against him individually.

If the petitioner had appeared at the audit of the account, as it had not recovered a judgment against the decedent and the action against him had abated, its claim would have been founded only on an alleged breach of contract occuring in 1881, and would have been barred by the statute of limitation.

This much is conceded by counsel for petitioner; but it is contended that the decedent having taken over the firm assets of Totten & Company, assumed a trust relation to the petitioner as to them, and that therefore his estate is liable to it for the amount of the judgment recovered against Totten individually. We cannot assent to this proposition. In *Baker's Appeal* 21 Pa. 76-82, it was held that "Where one partner sells his interest to another in consideration of an engagement by the latter to pay the partnership debts, the engagement to pay them is but a personal contract. It creates no lien on the property." And "parties may by mutual agreement, as by the sale of one partner's interest to his co-partners, convert the partnership property into individual property;" *Shumaker on Partnership*, 225. The effect of the transfer by Totten to Hogg of the former's interest in the firm assets was to convert them into the individual property of the latter, and if he did covenant with Totten to pay the firm's debts, which, however, is not admitted in the answers, no trust was created; but it was only a personal covenant which could be enforced by Totten alone. Moreover, it appears that when the assets of the firm were assigned to the decedent, that both Totten and the firm were insolvent, and that the decedent expended more than their value in the payment of the firm's debts; the partnership was then dissolved, and as its assets were applied to the payment of its debts, there never were any in the executors hands to be applied to the payment of petitioner's judgment, if it be valid as against firm assets.

If, however, there was a trust it was constructive; could only be enforced within six years from its creation, and as it originated in 1889, any claim under it is barred: *Ashurst's Appeal* 60 Pa. 290.

As we think the decedent's estate is not liable for petitioner's claim, it is not necessary to consider whether the decree of the court and distribution thereunder are conclusive; and the petition must be dismissed.

In re SAME.

No. 116 January Term, 1903.

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Opinion by HAWKINS, P. J. (DISSENTING). Filed February 28, 1907.

OPINION.

I must dissent from the proposed decree in this case because in my judgment Mr. Hogg's estate is liable morally and equitably for the payment of the judgment presented. He voluntarily assumed the position of liquidating partner for the firm. He was in no wise a purchaser of the firm assets. He took possession of them all—his partner's share as his own—for the purpose of paying the firm's debts: and thus assumed a trust whose duration could only be measured by the accomplished of this purpose. It would have been a breach of good faith had he failed in this purpose not only to his partner, but to the firm creditors, *Fulton* v. *Bank* 92 Pa. 112. That he regarded the claim now presented as a possible liability is shown by the fact that he took Mr. Totten's place in the conduct of the pending litigation and so continued until his death; there can be no doubt from his well known character that he would have paid it to the last penny in the event of adverse judgment; and what he must have done, his executors ought to do. The objection of long delay in the litigation was just as much the fault of defendant as the plaintiff, as either might have intervened and speeded the case; *R. R.* v. *Butler* 181 Mass. 488. The executors themselves contributed to the delay in hopes that the litigation would be dropped. So we have nothing to do with the alleged injustice of the claim; for that was a matter upon which the local court was competent to pass, and "full faith and credit" must under the the Constitution be given to its judgment. The requirement of the Constitution is not that some, but that full faith and credit shall be given; *Haddock* v. *Haddock* 201 U. S. 562. Nor is the form of the judgment a valid ground of objection: Mr. Totten was the surviving party; and in ordinary course the object of process, because in possession of firm assets; but he had nothing: Mr. Hogg as has been seen was the real party and the firm assets which ought to have been in the surviving partners hands were in the hands of his executors *Russell* v. *Cole* 167 Mass. 6. Having had his day in court, and the purpose for which these assets were placed in his hands awaiting accomplishment, the requirement of a personal action would be worse than useless; it would be a denial of justice. Nor has the suggestion of conclusiveness of the decree of distribution any more merit. While it is true the plaintiffs knew of Mr. Hogg's death, they were not in position to prove their claim at the audit because they had not yet obtained judgment against the firm; and being foreign creditors could not be expected to know of the audit; *Merkel's Ap.* 17 W. N. C 462. The executors representing primarily the creditors, and knowing the pendency of this suit ought to have given them notice; instead of notification their policy was to ignore this claim; and it was because of this misleading policy that the court made the decree which gives rise to the present action. This is not a bill of review under the act of 1840, but a proceeding entirely outside that act, based on the principal that courts of justice are bound to correct their own mistakes when it can be done without prejudice to intervening rights. So far as the executors are distributees, there is no change in the situation for the money is still in their hands, and they knew of the existence of this claim; *Townsend's Ap.* 106 Pa. 272. Any distributee may be compelled to refund on the ground of fraud; *Palmer* v. *Truby* 136 Pa. 560, and why not on the other equitable ground of mistake? The next of kin are but volunteers. Here are the very assets with which Mr. Hogg undertook to pay firm debts, and for which living he must have answered; and dead, his legatees have no higher right.

For petitioner, *Lyon*, *Hunter* and *Burke*.

For respondents, *Shiras & Dickey* and *Wm. M. Hall*.

An injury received by making an intentional assault on another by striking him in the face with the fist is held, in Fidelity & C. Co. v. Carroll (C. C. A. 4th C.) 5 L. R. A. (N. S.) 657, not to be by accidental means, within the meaning of a policy insuring against injuries received through such means.

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Court of Common Pleas No. 2,

ALLEGHENY COUNTY.

BELL v. ROWLAND INSTANTANEOUS DYE SOAP CO.

Suit for wages—Contract for—Interpretution of —Rule for judgment.

No. 1108 July Term, 1906. Sur rule for judgment.

Opinion by SHAFER, J. Filed September 19, 1906.

The action is for wages claimed to be due the plaintiff from the defendant upon a contract of employment made in writing between them, a copy of which is annexed to the affidavit of claim. From this contract it appears that the plaintiff agreed to work as a soap-maker for the defendant for one year from the date thereof "should both live such length of time." In consideration of these services defendant agreed to pay the plaintiff the sum of $1200, in 52 equal instalments on the last day of each week. The plaintiff alleges that he acted as soap-maker for the defendant and was paid according to this contract up to May 14, 1906, and that thereafter the defendant refused to give him employment or to pay his salary, and that he had made every reasonable effort to secure employment elsewhere but was unable to secure it. The affidavit of defense alleges that about May 14, 1906, the company ceased to make soap and had become insolvent, and "that the corporation by virtue of its insolvency and for want of business being compelled to go out of the business, become insolvent and died on or prior to May 14, 1906." Just what was meant by the parties who entered into the agreement above mentioned, it might be difficult to say. An agreement to do or not to do something so long as a corporation shall live might be susceptible of different meanings according to the nature of the thing to be done. It might refer to the actual dissolution of the corporation or to its insolvency or bankruptcy or to its continuance in the business in respect of which the act was to be done. We are inclined to think that in the present case it should be construed to mean that the defendant would employ the plaintiff in soap-making so long as it continued in that business.

Without, however, committing ourselves to this interpretation, we are of opinion that the circumstances surrounding the making of the contract and the present condition of the company are matters which should be inquired into, to aid in the interpretation of the contract and that the plaintiff is therefore not entitled to judgment.

For plaintiff, *J. A. Metz.*
For defendant, *Calhoun & Johnson.*

(Common Pleas No. 2, Allegheny Co.)

STERN v. BAILEY.

Surety—Liability—Defenses.

A surety is not relieved of liability by a modification of the agreement between the parties after his liability is fixed, if it appears that the modification is for the benefit of the person for whom the surety acted, and there is nothing to show that by reason thereof there was an agreement not to sue or an extension of time.

No. 72 July Term, 1906. Sur rule for judgment.

Opinion by SHAFER, J. Filed November 15, 1906.

The action is against the surety on a joint and several bond in the sum of $300, conditioned that if the principal, one, W. T. Marlowe, shall pay for or cause to be returned to the plaintiffs, all cloth, clothes or money for the same that he shall receive; and the allegation of the plaintiffs is that by the 7th of June, 1905, they had furnished to Marlowe cloth and clothing to the value of $331.45, which he had not returned nor paid for. The defense set up is that in October, 1905, it was agreed between the plaintiffs and Marlowe that in their future dealings they would add $2, to their regular list prices for overcoats and coats and $1 for vests and trousers, and that they would credit these amounts to Marlowe against the above mentioned indebtedness until it was cleared up, and that they would furnish him with samples, etc.;

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and this defendant claims released him from his obligation as surety, because the agreement was entered into without his knowledge and consent and constituted a new contract. If the goods, the retention of which is alleged as the breach had been furnished to Marlowe after the modification of the agreement above stated, there would be some reason for holding the defendant discharged, but the modification set up by him was entirely for his benefit, and did not apply in any way to the goods already purchased, nor is there any allegation that the plantiffs agreed not to sue Marlowe or extended the time of payment of what he already owed.

The rule must therefore be made absolute.

For plaintiff, *R. T. McCready.*

For defendant, *Ralph M. Strawbridge.*

CRIMINAL LAWS. (STEALING GAS.) ILL.—It is notorious that people who are otherwise honest have no scruples over attempting to outwit the custom house officers and that beating public service corporations is not so serious an offence as "just plain stealing." In Illinois the occupant of a building lighted and heated by gas arranged by means of rubber hose connections to have the gas flow from the supply pipe around the meter without passing through. When the agent of the gas company was expected he would replace the meters and allow them to remain in position until they had been read. This plan worked so satisfactorily that he afterwards discarded the rubber pipe and took gas direct from the main by means of stopcocks and pipes concealed in the walls of the building. This proceeding was discovered and prosecution begun. Woods v. People, 78 N. E. 607. The Supreme Court of Illinois adopts previous holdings of other courts to the effect that gas used for illuminating and heating purposes may be the subject of larceny. Commonwelth v. Shore, 4 Allen (Mass.) 308; State v. Wellman 25 N. W. 395, and Regina v, White, 6 Cox C. C. 213 are cited. The contention was made that prosecution should be brought not for larceny but under that section of the Criminal Code which makes it an offense for persons to tamper with gas meters. The section referred to does not undertake to punish one for unlawfully abstracting gas, but was passed with a view to protect gas, water, or electric meters from being tampered with or false connection being made, so that gas, etc., might be consumed or utilized without passing through or being registered by the meter. The contention is rejected, however, and it is pointed out that one might be guilty of a violation of this section without obtaining any gas from the company.

Another interesting point raised by the case is whether the defendant was guilty of grand larceny, there being a dispute as to whether the evidence showed that the gas taken at any one time amounted to more than $15. The question was whether the amount consumed each day was to be construed as a separate taking, or whether a single offense covered the entire periods in each month during which the appliance for securing the gas was in operation. The court instructed the jury that if they believed that the defendant had been stealing gas for any number of days cotinuously prior to the time of the discovery, they should add together the various values of gas stolen from day to day during this period in fixing the value of the property stolen. This instruction is approved by the Supreme Court.—*The Green Bag.*

MUNICIPAL CORPORATIONS. (FRANCHISES.) U. S. S. C.—A number of related points determining the charter rights of street railways in the city of Chicago are contained in Blair v. Chicago, 26 Supreme Court Reporter, 427. The right of the city to fix the term during which street railway companies may occupy the streets is declared by holding that the authority given to the city under acts, February 14, 1859, and February 21, 1861, to fix the terms and conditions upon which the street railway companies chartered by these acts with a corporate life of twenty-five years should occupy its streets, includes the power to fix the term of such occupation. Probably the decision of paramount importance is to the effect that the right to use the streets of Chicago for street railroads was not extended to ninety-nine years without reference to any limitation of time fixed by the municipality by the

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amendatory act of February 6, 1865, which extended from twenty-five to ninety-nine years, the corporate life of the companies created by the acts formerly referred to, and also gave the right to construct and maintain street railways on streets designated by the common council upon terms and conditions approved by such council. It is held that the right to operate the street railways until the city should exercise its reserved right to purchase them is confined to the streets designated in the orignal ordinances and such later ordinances as indicate a purpose to preserve the permission of the original ordinance, and does not, by reason of the fact that the street railway system has become a unity, extended to the rights of occupancy acquired in other streets so as to continue such right until the purchase of the entire system.—*The Green Bag.*

CONSTITUTIONAL LAW (INTERSTATE JUDGMENTS, DIVORCE).—Joseph H. Beale, Jr., sharply criticises the recent decision of the Supreme Court in Haddock v. Haddock, in an article in the June *Harvard Law Review* (V. XIX, p. 586) entitled "Constitutional Protection for Divorce." He summarizes the reasoning of the court as follows:

"It is now time to examine in detail the reasoning of the court. This may be summarized thus: For a valid divorce it is necessary that the libellant should be domiciled in the state which grants the divorce; it is also necessary that there should be personal jurisdiction over the libellee in order that it should be enforceable under the 'full faith and credit' clause of the constitution; but if there is no such jurisdiction over the libellee, the divorce will be valid where granted. I propose to show that either the first or the third proposition is absolutely inconsistent with the second, and with the decision of the court."

The author shows that the admitted requirement of domicile of the libellant is proof that a proceeding for divorce is *in rem.* The *res* is intangible just as in the case of an administration of an estate.

"Jurisdiction does not involve the power of continuing rights in existence, but of creating rights; its operation is positive, not negative. Both New York and Connecticut, having jurisdiction over the status of marriage, can affect it by dissolving it; but once it has been dissolved nothing is left for either to affect. The same criticism might be brought against allowing the status of a woman in New York to be affected by a marriage in Connecticut."

"It has been heretofore believed that the full faith and credit clause required a state to give credit to every judgment which was valid in another state, where it was rendered. If because of lack of jurisdiction of the court the judgment was not binding in another state, it was equally void where it was rendered; for no court can create obligations by acting outside its jurisdiction."

"If Mr. Justice White is right in requiring domicile of the libellant for jurisdiction, he is wrong in regarding jurisdiction over the libellee as essential. If he is right in saying the decree is valid in Connecticut; he is wrong in saying it is not binding in New York. His reasoning is certainly novel, and it is certainly wrong; can his conclusion nevertheless be supported? Is the decision right, that some jurisdiction over the person of the libellee is requisite?"

"The object of the majority was a praiseworthy one: to make objectionable divorces less easy to obtain. But in pursuit of that object they have made a decision which will have an opposite effect. For it gives an easy road to divorce where the parties are agreed in desiring it, since the libellee by appearing and suffering default can render the proceeding valid, and it thus assists collusive divorces. On the other hand, it makes it impossible to secure a divorce that will everywhere be recognized in the one case where all persons admit that a divorce should be granted, that is, where the wife elopes with an adulterer. For if she goes to another state, and the injured husband obtains a divorce in her absence, the state of her new domicile need give no credit to the divorce unless it finds that the fault is with her; and as her husband is not present, and she therefore has the entire control over the evidence, she will be able to convince the court of her own innocence and her husband's fault.

"The decision then is opposed to reason, to authority, and to morality; but it will stand until the question is raised again. As Mr. Justice Holmes said in his dissenting opinion, civilization will not come to an end meanwhile."—*The Green Bag.*

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PITTSBURGH, PA., MARCH 27, 1907.

Court of Common Pleas No. 1,

ALLEGHENY COUNTY.

In re Assignment of A. N. MARTIN.

Assignment for creditors—Act of June 4, 1901. Assignee — Appraisement of goods — Surcharge.

An insolvent in 1904 made an assignment for the benefit of his creditors. His assignee sold certain of his goods at private sale without an order of court contrary to the terms of the act of June 4, 1901, relating to insolvency. Held, that the act of 1901 was suspended by the bankruptcy act of 1898 and even though all parties concerned intended to proceed under the former act, the assignee could not be surcharged because of his failure to proceed with a sale in accordance with its terms.

In an assigned estate for the benefit of creditors the inventory and appraisement is not conclusive of the value of the estate but rather what is a fair and reasonable value of the goods at the time of sale determines their value. And so in an attempt to surcharge the assignee, if it appears that he made the best effort he could to obtain the best price possible for the goods and acted in good faith and with due diligence in view of all the circumstances he should not be surcharged, if the amount realized from the sale was less than the appraisement.

No. 790 June Term, 1903. Exceptions to auditor's report.

Opinion by MACFARLANE, J. Filed February 19, 1907.

The inventory of this estate was as follows:

Cash	$ 27.85
Fixtures	77.50
Merchandise	10,323.36
Book accounts good	8,266.52
Book accounts doubtful	9,041.14

Leaving out the doubtful accounts the total appraisement was $18,695.23. The auditor surcharges the assignee with the difference between the inventory of the merchandise and the good accounts and the actual amounts received, also with the cash and the fixtures; and in addition the fee paid to his counsel is reduced one-half, and he is not allowed any commission, or any of the expenses incurred by him, a total surcharge of $8,765.40.

To warrant so severe a surcharge there must be satisfactory evidence of reckless mismanagement and gross negligence or bad faith. We have examined the report, the testimony and the accounts with great care, and have arrived at a different conclusion than that of the auditor in so many instances that it is necessary to review the case at length.

The assignee on May 27, 1904, filed a first and partial account, which was so headed, and this was referred to the auditor to pass upon a number of exceptions. The assignee charged himself with the cash received by him from all sources up to the time of filing his account, and we fail to find any evidence of an omission of any sum which should have been in that account which was not satisfactorily accounted for upon the audit. The auditor conceives that the assignee should have charged himself with the inventory, and because he has failed to do so, surcharges him. The first and second findings, on page 9, are put expressly upon that ground, "The auditor finds as a fact that the accountant did not charge himself with the amount of the inventory and appraisement filed in this case, and finds as a matter of law that he should have charged himself with that amount, to wit, $10,323.36, and is therefore surcharged with the difference between $10,323.36 and $8,183.52, the amount received from the sale of stock, or $2,139.84," and the surcharge of the accounts is on the same ground. The auditor finds that the bad or doubtful accounts are practically worthless.

The basis of this surcharge is this statement: "According to the appraisers there came into the hands of W. W. Hewitt, assignee, property of A. N. Martin & Company of the certain value of $18,695.23," and the auditor later refers to the "above

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appraised values." The findings of fact and the discussion are so interwoven that it is difficult to ascertain from the report what the facts are, and it is not fair to the assignee to treat as a finding what may be intended as an expression of opinion. On page 12, paragraph 6, the auditor says, in passing on the exception to the assignee's compensation, that he carefully considered the testimony of the appraisers and also the testimony of the assignee, and that the accounts were appraised carefully as good and bad on the personal knowledge of the appraisers, with two exceptions, and that the debtors whom neither of the appraisers knew were marked doubtful, and that the account and statement of sales did not enable anyone to verify the sales or to show upon what tobacco money was lost or to whom sold, that the assignee's testimony shows that all of the tobacco was not sold.

The gist of this is that without a finding of what the goods were actually worth and should have brought at assignee's sale, and without a finding that the accounts marked "good" were actually collectible, and that diligent effort had not been made to collect them, the surcharge is based upon the bald proposition that the failure to state the account in the ordinary way made the account liable. In his discussion the auditor also assigns as a reason that the goods were sold at private sale without an order of court, as required by the act of June 4, 1901, and a part of his reason is that the particular sales and the particular losses were not explained in the account.

The inventory was on file but the assignee was not accounting for all of it. The auditor made up his report treating the account as final, and upon petition of the assignee we referred the case back, a final accounting being then filed. The final account was in the regular form, the auditor had plainly erred in his rulings in his first report in treating this as a final account, and when the court referred the whole matter to him it became his duty to reconsider the whole case upon the final account. That account was so stated that it met practically every objection made by the auditor. It showed the amounts realized in excess of the appraisement and from what sources, also the amount collected from book accounts marked "not good" and claims credit among other things for the amount lost upon sales of merchandise, giving the details of those sales. Further testimony was taken showing the efforts made by the assignee to collect accounts, and there was in the whole case testimony explaining the losses upon sales and accounts and why they were incurred. The assignee was entitled to a consideration of the whole case, and the merely formal matters having been cured, the auditor should have gone into the merits. Yet we find no evidence of any such attempt and nothing further than an adherence to the former decision. Had the form of the account not been changed we do not think the surcharge justifiable, but it is unnecessary to discuss this in view of the final account.

The act of June 4, 1901, P. L. 404, does not apply to this case. In *Potts* v. *Smith*, 25 Supr. Ct. 206, the insolvent did not apply for the benefit of the bankrupt act nor did any of his creditors, and it was held that the act was suspended by reason of the existence of the bankrupt act, the court saying: "We feel constrained to hold that the act of June 4, 1901, relating to insolvency did not become operative because of the existence of the bankruptcy act of the United States of July 1, 1898, as to the persons and subjects to which the latter act applies." *Potts* v. *Smith* was decided on May 11, 1904, this account was filed on May 27, 1904, and the decision was called to the attention of the auditor, but he thought the state act applied as the bankruptcy act had not been invoked and found that all parties connected with the case intended to conduct the entire proceedings in compliance with the act of 1901. It is true counsel for the assignee seems to have supposed that he must proceed under the act of 1901, and counsel for the exceptants so contended; but this does not justify the holding of the assignee responsible for failure to comply with the terms of this act. The testimony does not support the conclusion that anyone is estopped.

This disposes of the third finding sustaining the third exception and holding that the assignee could not sell at private sale with-

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out order of court and making this as a matter of law one of the grounds for surcharge. We therefore consider this case freed from the requirements of the act of 1901.

The assignor was in the wholesale tobacco business, a large amount of his stock was stored with the Union Storage Company, and of this 293 cases were pledged as security for a loan of nearly $6,000, while the unpledged tobacco was liable to be sold by the Storage company as well as that pledged. We do not find the collateral note in the papers, but the testimony, together with the well known custom, is sufficient to support this conclusion. The remainder of the tobacco was in a warehouse, while samples were kept in the office of Martin, the assignor. The appraisers did not examine the stock itself, one of them saying it would be interminable to examine each separate cask. They say they allowed a certain percentage for shrinkage in weight and then appraised at the wholesale market price. One of the appraisers, Mr. Smith, did not undertake to say that the appraised prices could have been obtained at a public sale. The samples were supposed to have been drawn from different parts of the casks, were tied together with a tag upon which was marked the number and weight of the cask, and tobacco is bought and sold by sample, the vendor giving a guarantee that the goods are up to the sample. It appeared both appraisers were experienced tobacco men and and tried to appraise the stock at the wholesale price that jobbers would pay. In the appraisement of the accounts two were estimated on the statement of Martin, the assignor, but the rest which were put down as "good" were on the opinion of one or other of the appraisers. They knew nothing about any claims for depreciation or improper delivery or of counter-claims, and their marking of accounts "good" was plainly not based upon their knowledge of the financial condition of the debtors, so much as upon their generally making payment, and one of the appraisers recognizes in his testimony the well known fact that it is much more difficult for an assignee to collect accounts than a merchant who is continuing in business and with whom a customer must maintain credit. One of the appraisers thought that the appraised price could have been obtained for the tobacco at private sale, but the opinion of both was contingent upon the goods being equal to the sample.

On the other hand, there is no evidence whatever that the assignee did not use due diligence and pursue the ordinary methods in attempting to dispose of this stock. It was impossible to have a public sale on account of the claims of the Storage company, and it may be doubted whether a public sale of such a stock ever brings anything like its value. No reason has been given here by anyone why a public sale should have been had other than the requirement of the act of 1901 for leave of court to conduct a private sale. The assignee who obtains full value for goods in his hands is the rare exception, and in addition this one says that the losses in his sales were largely on the remnants of different lots; that the tobacco was of inferior grades, and that the appraised value in some cases was too high; but aside from this there is nothing to contradict his testimony that he made the best effort he could to get the best price possible. The final account shows that the losses on individual lots were as a rule small.

As to the collection of the accounts, the testimony is overwhelming that all of the ordinary means were exhausted, and the auditor allows to counsel for the assignee the sum of $400 as a fee for his services in making collections. In addition, he finds that the accounts marked "doubtful" were uncollectible, basing this upon testimony which is identical with that applying to the other uncollected accounts. Very good reasons were assigned why these customers of the assignor would not pay, and in practically every account there were claims for depreciation, for money paid, or for checks exchanged and paid by the debtors, and in view of the business methods of the assignor in kiting checks disclosed by the testimony, we wonder that the assignee collected as many of the claims as he did. The customers were small manufacturers, and most of them not financially responsible. Yet the auditor ignores all of this testimony and neither does he make the surcharge on the

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ground that the assignee was negligent or was guilty of bad faith.

In *Semple's Estate*, 189 Pa. 385, the court below took substantially the same view as that of the auditor in this case and said: "In view of all the circumstances the prima facie character of the inventory has not been overcome; and the executors must therefore be surcharged with the loss which resulted from her negligence." This was said not to be the proper test to determine the liability, and that it was necessary to take into account the situation and condition of the estate; the character and quality of the goods sold; the opinion of witnesses best qualified, ... and the good or bad faith of the accountant in making the sale. It is also held that a trustee should be guilty of gross negligence in order to surcharge him, and if there is nothing wilful in his conduct, no *mala fides*, the court will always favor him, and that all that is required is to exercise common skill, common prudence and common caution, and he is not liable beyond what he actually receives, except in case of gross negligence or bad faith. There are many other cases to the same effect, among them a well considered opinion of Judge Sulzberger in *Powell* v. *Fox*, 20 Co. Ct 311.

We take the principle to be that the inventory is conclusive upon no one, and the real value of the appraisers' opinion depends on their qualifications and the principles of valuation. The question is not what is the intrinsic value, but what is the fair and reasonable value at the time of the sale, the selling value as contrasted with the intrinsic value, and the question before the auditor was how much cash could be had by the assignee for the goods by the exercise of due diligence in view of all the circumstances. This issue was not decided, and the report has therefore not the usual conclusive effect.

The auditor does not suggest bad faith until in his last report when the question of the allowance of compensation was again before him. The rule was perhaps in his mind that the accountant should not be deprived of his commissions if he has acted in good faith, and he says, "Exception No. 4 is also overruled for the reasons set forth on pgs. 12, 13 and 14 of the auditor's first report," (which were that the assignee continued the business of selling and lost over $2,000 instead of making the jobbers' profit, and this at private sale without order of court, and that his account does not fully show in detail the items, and that the book accounts were inventoried as good, and that these matters were not fully explained by the assignee) "and for the further reason that the auditor is now of the opinion that the assignee has not acted in good faith toward the creditors." There was nothing in the later testimony nor in the final account which tended to discredit the assignee. Quite the contrary. And this expression of opinion is not such a deliberate finding of fact as to be binding upon us, and it is plainly an after thought. We are unable to find anything in the case from beginning to end showing bad faith. The assignee acted throughout upon advice of counsel. As good or bad faith is a question of intention, advice of counsel honestly followed is a protection and is, at least, very persuasive evidence of good faith, in some cases held to be conclusive: *During's Appeal*, 13 Pa. 224; *Bradley's Appeal*, 89 Pa. 514.

A public sale was not practicable especially in view of the amount of tobacco pledged, and it would seem that private sales were the best method. This necessarily took considerable time and expense, not an item of which was attacked. The method of procedure adopted by the exceptants before the auditor was to first put the accountant on the stand followed by the appraisers. They thus assumed the burden and it would be unreasonable to require the accountant to support in detail his expenditures, his losses and other credits until something was shown against them. It is unjust to wipe out his claim of credit for expenses with a stroke of the pen as was done here without any finding or evidence that they were not honestly incured, but upon the ground that he had no right to sell at private sale.

While we cannot agree with the sweeping surcharges nor the grounds upon which they were made, some of the matters noted by the auditor or appearing in the testimony require further consideration.

The total charge in the account for merchandise and fixtures is $10,598.31. For goods sold in excess of the appraisement the assignee charges himself with $181.42.

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He claims credit for $1,317.40, the amount lost upon the inventory price of merchandise, a net loss from inventory price of $1,135.98. Considering the loss of customers always incident to the closing down of a "going" business and the necessity for selling for cash, this depreciation is not remarkable. The books showed the sales and to whom made and where the losses were incurred, for counsel have given them in the final account taken from the books.

Of the expenses disallowed by the auditor $72 were for internal revenue stamps, $56.25 for telephone, $122.90 for insurance, and $24.84 for postage. Such a ruling would deter anyone from accepting any trust whatever. For labor $663.55, hauling $151.02 and for rent $210 may be high, but these outlays have not been specifically attacked. The assignee did not continue the business in the sense that he bought as well as sold. His principal work was collecting the accounts, and he was entitled to have some place in which to conduct the business and to keep the tobacco. The total cash received was about $15,475, and the contra account is apparently reasonable.

The surcharge of $341.05 is covered by the foregoing discussion and the exception to it should be sustained. The assignee was not bound to account in his first account for money he had not received at the time of the filing of that account nor for goods not yet disposed of. He cannot be said to have fraudulently concealed anything which he was not bound to disclose. Nevertheless, when criticism was directed towards the method of stating the account and towards the lack of clearness in the exhibits, counsel should have prepared statements giving the information called for instead of waiting until there was an adverse decision. The final account cured most of the matters complained of, and the exceptants could have renewed their attack but did not do so. Most of the expenses of the audit were incurred in passing upon claims on the fund but some of them were caused by the failure of the accountant to fully explain the situation, and his commission should be decreased by an amount sufficient to meet this. There is nothing to show that the commission asked was excessive if the estate was handled honestly and with due diligence, and the auditor does not disallow it on the ground that it is excessive, and it is therefore fixed at $1,000.

Much of the expense for counsel was incurred in defending the assignee, and as he exposed himself to the attack, all of the fee claimed by the counsel last employed by him could not be paid from the fund. The auditor has allowed $650 for counsel fees, of which $400 was for work in making collections. For the preparation of a proper account attending the audit, advising the assignee and preparing the necessary papers in this case, the total fee allowed is, considering the work of making collections and the allowance therefor, inadequate. The auditor, however, has better opportunity to know the labor involved than we have, and we assume that his judgment is nearly correct; and yet he was undoubtedly influenced by his belief that the proceedings had been improperly conducted under the act of 1901, so that we will make the entire fee $750, of which $600 is awarded to Mr. Wheeler and $150 to Castle and Jarvis.

The fee allowed to counsel for certain creditors is without authority in law or fact. It was on the theory that they had created a fund by successfully opposing the claims of Hill & Company and others, and not upon their having surcharged the assignee. Even the latter ground is not tenable, but this is not within the class of cases where such costs are allowed and is in no way similar to a fund raised by a creditor's bill: *Patrick* v. *Bingaman*, 2 Supr. Ct. 113; *McKelvey's Appeal*, 108 Pa. 615. The case of *Trustees* v. *Greenough*, 105 U. S. 527, does not support the auditor's decision.

The auditor finds the claim of Hill & Company to be "about $4,000." He should have found the exact amount, even though he disallowed it. This claim is based upon a mass of testimony, and it is impossible for us to decide how much was actually due, and we take the later statement of the auditor, on page 19, "the amount of $4,000," as fixing the claim. The claim of J. W. Singer is $825.25. Both ask for a much greater allowance, and the auditor finds as a matter of law under the act of 1901, section 29, that their claims were fraudulent and should be

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postponed to all other creditors. Holding that that act is suspended, this ruling cannot stand. The act of 13th Elizabeth, Robert's Digest, page 295, does not apply to this case, although under it an execution issued for an amount greatly in excess of the amount actually paid was held to be fraudulent: *Weiskircher* v. *Voke*, 29 Supr. Ct. 611. The amounts above stated are allowed Hill & Company and J. W. Singer.

We have not attempted to dispose of the exceptions by number. Our rulings are indicated in the foregoing opinion and counsel may prepare an order in accordance therewith.

We hesitate to add anything more to this long opinion, but in view of the manner in which the three last auditor's reports coming to the hand of the writer of this opinion have been stated, we must call attention of members of the Bar who are selected as auditors to the established practice which has been disregarded in these reports. Two of them blend findings, argument and conclusions of law and are unnecessarily prolix. The third was proper in form but did not contain any opinion. There is no difficulty in ascertaining the proper method, and the failure to follow it adds enormously to the labor of the court. Pepper & Lewis' Digest refers to many cases, and we call especial attention to *Mengas' Appeal*, 19 Pa. 221; *Citizens Gas Company* v. *Shenango Company*, 24 W. N. C. 473; *Mortland* v. *Mortland*, 151 Pa. 593 (p. 597), and to a model report made by a member of this Bar in *Warner* v. *McMullin*, 131 Pa. 370.

For assignee, *John R. Wheeler.*

For auditor, *H. S. Lydick.*

For exceptants, *Dalzell, Fisher, Young & Hawkins, F. W. Hughey* and *M. L. Thompson.*

PROOF OF CLAIMS IN BANKRUPTCY —PURCHASE OF CORPORATE STOCK FROM DIRECTORS.

The case of *Re Castle Brade Co.*, 17 Am. B. R. 143, holds that a contract made in good faith between a corporation and its officeas and directors for the purchase of the latter's stock, to settle pending litigation and to settle dissensions between the stockholders, all of whome assented, in consideration of the transfer of said stock, and the agreement of the transferees not to engage in competition with the corporation for three years, is valid, and where about eighteen months after the making of the contract bankruptcy proceedings are instituted against the corporation, in proof of claim, based upon said contract, which fully sets forth the facts and alleges performance on claimant's part of all conditions precedent, that most of the payments have been made and that a porton of the amount is unpaid, is sufficient *prima facie* to establish the claim, and the burden of showing that the contract is *ultra vires* is upon the trustee who contest.

LIQUOR LAWS OF PENNSYLVANIA. By L. FLOYD HESS, Esq., and W. ALFRED VALENTINE, Esq. REES, WELSH & COMPANY, Publishers, 901 Sansom Street, Philadelphia, Pa.

This work is a digest of the laws and decisions relating to the manufacture and sale of intoxicating liquors, with treatise on the granting, transfering and revoking of wholesale and retail licenses, the fees payable by the different licensees, the civil and criminal responsibilties of licensed and unlicensed vendees and intoxicated persons, and the liability arising under a contract for the purchase and sale of liquors, together with the procedure and forms used in the various cases arising under the administration of liquor laws. An important feature of the work is a table of acts from 1718 to 1906 that are now in force relating to liquor laws, with a synopsis of each act. There is an elaborate table of cases cited, the value of which is shown when it is considered that over six hundred cases have been refered to, construing the liquor laws, and questions growing out of the sale and manufacture of liquors. The book also treats of the Pure Food Laws as far as they apply to liquors. The index, which is an important part of book, is well arranged and complete.

For sale by J. Oscar Emrick, 426 Diamond Street, Pittsburgh, Pa.

An incontestable clause in an insurance policy is held, in Bromley v. Washington L. Ins. Co. (Ky.) 5 L. R. A. (N. S.) 747, not to prevent the insurer from resisting payment on the ground that it was issued to one having no insurable interes, and is therefore viod as against public policy.

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PITTSBURGH, PA., APRIL 8, 1907.

Circuit Court, United States,

WESTERN DISTRICT OF PENN'A.

ZEIGER v. PENNSYLVANIA RAILROAD CO.

Personal injuries—Action—Non-resident alien parent–Right to sue–Acts of 1851 and 1855.

A non-resident alien parent is not entitled by the acts of 1851 and 1855 to recover damages for personal injuries resulting in death to his son, a resident of Pennsylvania.

Deni v. *Pennsylvania R. R. Co.*, 181 Pa. 525; *Maiorane* v. *Baltimore & Ohio R. R. Co.*, (not yet reported), followed.

It is the rule of the United States courts to follow, as in this case, the definite, positive decision of the Supreme Court of the state upon the construction of any local statute, made prior to any contract obligation incurred with respect thereto, and prior to any contrary decision of the United States courts.

No. 38 May Term, 1906.

Opinion by EWING, J. Filed March 6, 1907.

The plaintiff is a citizen and resident of the city of Zenta, Kingdom of Hungary, and in this action seeks to recover damages by virtue of the provisions of the acts of 1851 and 1855 of this commonwealth for the death of his son, George Zeiger, late a resident of Pittsburgh, Pa., which was occasioned by a collision while the said decedent was a passenger on a train of the defendant company en route from New York to Pittsburgh. The train in which the said George Zeiger was a passenger collided with another train of cars of the defendant company at or near Harrisburg, Pa., early on the morning of May 11, 1905, and in that collision the said George Zeiger was so badly injured that he died about 11 o'clock that morning in the Harrisburg Hospital where he had been taken. The said George Zeiger was unmarried and the plaintiff is his sole living parent and the only person entitled to recover under the acts aforesaid. The declaration also alleges that the decedent devoted a large part of his earnings to the support and maintenance of the plaintiff and for years had been, and at the the time of his death was, his sole support.

The defendant company has filed a demurrer and assigned in support thereof the following reasons:

1. That the plaintiff is and was at the time of the accident complained of a non-resident alien parent.

2. That plaintiff's son, George Zeiger, was at the time of the accident complained of a resident of the state of Pennsylvania.

The case was argued on this demurrer and the pivotal point is whether or not the plaintiff, being a non-resident alien, can maintain this action under the provisions of the statutes of this state above referred to and the decisions thereon of the Supreme Court of this state in *Deni* v. *Pennsylvania Railroad Company*, 181 Pa. 525, and *Maiorane* v. *Baltimore & Ohio R. R. Co.*, decided January 7, 1907, and not yet reported, the contention of the plaintiff being that notwithstanding these decisions of the Supreme Court of this state, the courts of the United States are at liberty to determine the question for themselves and are not concluded by those decisions.

I have examined with great care the very extensive and excellent brief furnished by counsel for the plaintiff and feel constrained to hold that the decisions of the Supreme Court of this state upon the statutes aforesaid are binding and conclusive upon the courts of the United States.

At common law the plaintiff had no right of action, nor anyone else, for the death of George Zeiger, and it is only by virtue of the purely local statutes aforesaid that any right of action is conferred. In construing those statutes the Supreme Court of this state in *Deni* v. *Railroad Company*, *supra*, after full deliberation and consideration has decided that, "Our statute was not intended to confer upon non-resident aliens rights of action not conceded to them or to us by

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their own country, or to put burdens on our own citizens to be discharged for their benefit. It has no extraterritorial force, and the plaintiff is not within the purview of it. While it is possible that the language of the statute may admit of a construction which would include non-resident alien husbands, widows, children and parents of the deceased, it is a construction so obviously opposed to the spirit and policy of the statute that we cannot adopt it. A non-resident defendant is not entitled to the benefit of our exemption laws, although the language of these laws may admit of a construction which would include him. It has been so held in a number of our cases. In this connection the language of Mr. Justice Sterrett, in *Collum's Appeal*, 2 Pennypacker 130, is pertinent. In delivering the opinion of the court he said: 'While non-resident debtors may perhaps be within the letter of the act we do not think they are within its spirit. As was said by Mr. Justice Woodward in *Yelverton* v. *Burton*, 2 Casey 351, and afterwards quoted approvingly by the present chief justice in *McCarthy's Appeal*, 18 P. F. Smith 217, we do not legislate for men beyond our jurisdiction.' In one respect, at least, our act of 1855 resembles our exemption laws. It is intended, primarily, for the benefit of the family of which the deceased was a member. The act of 1851 gave a right of action to the personal representatives of the deceased. Mr. Justice Green referred to this act in *Books* v. *Borough of Danville*, 95 Pa. 158, and said: 'The effect of this act was to make the damages recoverable in such actions general assets of the deceased in the hands of the personal representatives, and of course they were available to creditors in the first instance. It follows that in all cases of insolvent estates of such deceased persons, where the victim of the injury was the husband and father, the widow and children derived little or no advantage from the action, although they were the persons most directly and severely injured.' But this objection to the act of 1851 was overcome by the act of 1855 which designated the persons to receive the sum recovered, and directed that they should take it in the proportion they would take the personal estate of the deceased, in case of intestacy, 'and that without liability to creditors.' In *Bacon* v. *Horne*, 123 Pa. 452, it was held that the act of May 3, 1855, P. L. 415, relating to the recording of an assignment made for the benefit of creditors by a resident of another state, which assignment included property of the assignor in this state, was for the protection of our own citizens, and that a creditor of the assignor who was a resident of the state in which the assignment was made could derive no benefit or protection from the act, although he was without notice of the assignment. There is nothing on the face of the act which limits the protection afforded by it to our own citizens. It is referred to as another illustration of the general rule that we do not legislate for persons beyond our jurisdiction. We have a number of statutes which expressly confer rights upon aliens, but none which confers them by implication or inference. When the legislature intends to concede to non-resident aliens the rights which our own citizens have under and by virtue of the act of April 26, 1855, it will say so."

This case was decided May 27, 1897, and has been the settled law of this state ever since and is reaffirmed in the case of *Maiorane* v. *Baltimore & Ohio R. R. Co.*, *supra*.

It will be noted that in the opinion of the court the decision is stated to be in line with the settled policy of this state respecting legislation as affecting non-resident aliens, so that, since the first of the cases along that line cited in the opinion to the present time, it may be taken as settled that in the absence of some express provision to the contrary, or the character of the legislation be such as to absolutely demand it, our statutes are to be construed as providing for and affecting only those in the territorial jurisdiction of the state.

The 34th section of the judiciary act of 1789 declares that, "The laws of the several states, except where the constitution, treaties, or statutes of the United States otherwise require or provide, shall be regarded as rules of decision in trials at common law, in courts of the United States, in cases where they apply." And this has been uniformly interpreted by the courts of the United States to apply to the positive statutes of the

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state and the construction thereof adopted by the local tribunals.

In *Burgess* v. *Seligman*, 107 U. S. 20, Mr. Justice Bradley in delivering the opinion says: "The Federal courts have an independent jurisdiction in the administration of state laws, co-ordinate with, and not subordinate to, that of the state courts, and are bound to exercise their own judgment as to the meaning and effect of those laws. The existence of two co-ordinate jurisdictions in the same territory is peculiar, and the results would be anomalous and inconvenient but for the exercise of mutual respect and deference. Since the ordinary administration of the law is carried on by the state courts, it necessarily happens that by the course of their decisions certain rules are established which become rules of property and action in the state, and have all the effect of law, and which it would be wrong to disturb. This is especially true with regard to the law of real estate and the construction of state constitutions and statutes. Such established rules are always regarded by the Federal courts, no less than by the state courts themselves, as authoritative declarations of what the law is."

This appears to be a fair and full declaration of the attitude of the United States courts towards the decisions of the state courts and to be fully recognized and acted upon at this date. The cases cited by plaintiff's counsel as authority for his contention that this court is not concluded by the decisions of the Supreme Court of Pennsylvania on the statutes aforesaid are all easily distinguishable from this case and do not authorize this court to disregard those decisions of the state court.

Buryess v. *Seligman*, *supra*; *Carroll County* v. *Smith*, 111 U. S. 556, and *Stanly County* v. *Coler*, 190 U. S. 437, are all cases where the question involved had either been decided by the United States courts prior to any decision by the state courts, or where the decisions of the United States courts were upon the very controversies upon which the state courts had rendered their decisions and in which the law had not been definitely settled.

Gibson v. *Lyons*, 115 U. S. 439, and *Barber* v. *Pittsburgh, Etc., Railway*, 166 U. S. 83, were questions of title to real estate where single judgments in the state courts, which would not be conclusive even there, were urged as authority in the United States courts, and by reason of their inconclusive character in the state courts were not regarded as binding by the United States courts. The latter case also involved the construction of a particular devise, which could only conclude the very question before the court and regarding which the United States court found that the state court had not consistently followed any single line of construction.

Mirick v. *Railroad Company*, 107 U. S. 102, was a case of contract of carriage and expressly stated to be not a question of local law but a matter of general law; and so *Railroad Company* v *Bank*, 102 U. S. 14, involved a question of general commercial law; and *Railroad Company* v. *Prentiss*, 147 U. S. 101, a question of general jurisprudence.

No single case has been brought to our attention where a definite, positive decision of the Supreme Court of the state upon the construction of any local statute, made prior to any contract obligations incurred with respect thereto, and prior to any contrary decision of the United States courts, has not been followed and observed as the law by the United States courts.

Stewart v. *Baltimore & Ohio Railroad Co.*, 168 U. S. 445, and *Dennick* v. *Pennsylvania Railroad Co.*, 103 U. S. 11, only hold that actions founded upon statutes similar to those in question in this action are transitory in their nature and can be prosecuted in other jurisdictions where the laws of such jurisdiction are not in conflict therewith or similar comity is observed.

In *Stanly County* v. *Coler*, *supra*, Mr. Justice McKenna in delivering the opinion and referring to the case of *Burgess* v. *Seligman*, *supra*, says: "The question presented was regarded as one of commercial law and general jurisprudence, and the right to exercise our own judgment was asserted. It was said that state decisions were to be followed when they had become a rule of property, and that, 'this is especially true with regard to the law of real estate and the construction of state constitutions and statutes. Such

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established rules are always regarded by the Federal courts, no less than by the state courts themselves, as authoritative declarations of what the law is. But where the law has not been thus settled, it is the right and duty of the Federal courts to exercise their own judgment; as they also always do in reference to the doctrines of commercial law and general jurisprudence. So when contracts and transactions have been entered into, and rights have accrued thereon under a particular state of the decisions, or when there has been no decision of the state tribunals, the Federal courts properly claim the right to adopt their own interpretation of the law applicable to the case, although a different interpretation may be adopted by the state courts after such rights have accrued.'"

In *Missouri, Kansas & Texas Ry. Co.* v. *McCann*, 174 U. S. 580, the Supreme Court said: "But the elementary rule is that this court accepts the interpretation of the statute of a state affixed to it by the court of last resort thereof."

In *N. Y., Lake Erie & Western R. R. Co.* v. *Pennsylvania*, 158 U. S. 431, it is said that: "A construction or meaning attributed to the terms of a state statute by the courts of such state will, of course, be adopted by this court when called upon to decide questions arising under such legislation."

In *Lapp* v. *Ritter*, 88 Fed. Rep. 108, the court said: "It is settled by the decisions of the Supreme Court of the United States that the construction placed by the highest judicial tribunal of the state upon a statutory or constitutional provision of the state is as binding and conclusive upon the courts of the United States as though the construction so given had been written into the statute by the legislature itself"

In *Green* v. *Neal*, 6 Peters 291, the Supreme Court said: "But the case is very differet where a question arises under a local law. The decision of this question, by the highest judicial tribunal of a state, should be considered as final by this court; not because the state tribunal, in such a case, has any power to bind this court, but because, in the language of the court, in the case of *Shelby* v. *Guy*, 11 Wheat. 361, 'a fixed and received construction by a state in its own courts makes a part of the statute law.'"

And in *Piqua Branch of the State Bank of Ohio* v. *Knoop*, 16 How. 375, the same court said: "The established construction of a statute of the state is received as a part of the statute."

Since, therefore, the statutes upon which the plaintiff in this action must rely to recover are purely local statutes and have been interpreted by the Supreme Court of this state as not applicable to non-resident aliens and conferring no right upon them, which decision has been adhered to without variation for the past ten years and has become the settled law of the state, and is in conformity with prior decisions upon similar statutes, thus making the policy of the law in this state of the character declared in the Deni case for a still longer period, and in view of the foregoing United States authorities as to the binding effect of decisions of the highest court of the state upon the courts of the United States with respect to the construction of local statutes, I am constrained to sustain the demurrer on the ground that the plaintiff as a non-resident alien has no right of action.

It is unnecessary, interesting as it might be and did time allow, to express the views of this court with respect to the statutes aforesaid.

The demurrer is therefore sustained.

For plaintiff, *Weil & Thorpe.*

For defendant, *Patterson, Sterrett & Acheson.*

Court of Common Pleas No. 2,

ALLEGHENY COUNTY.

VOLUNTEER FIRE COMPANY OF HOMESTEAD v. SCHUCHMAN.

Corporation—Officers—Confidential relation—Breach of trust.

S, the treasurer and other officers of a Volunteer Fire Company, purchased an outstanding mortgage on property of the company, foreclosed it and bought in the property. The originat mortgagee was not asking for payment and there were funds with which to pay interest. Held, that the relations of S and the other officers to the company was one of such confidence that the

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transaction was a breach of trust and the property should be reconveyed to the company.

No. 652 July Term, 1905.

Opinion by YOUNG, J. Filed March 8, 1907.

The bill seeks an injunction, and a decree that the lands described in the bill are held by the defendants in trust for the plaintiff.

FINDING OF FACTS.

1. The plaintiff is a corporation of the first class, having its domicile in the borough of Homestead in this county, and was formed for the purpose of the protection of property from fire.

2. In 1884 the plaintiff, by deed dated the 11th day of July of that year, became the owner of the land described in the third paragraph of the bill, worth at the present time the sum of six thousand dollars.

3. On the 26th day of November, 1902, the plaintiff delivered to the German Savings & Deposit Bank of Birmingham, its mortgage for the sum of $1,800, payable in three years from its date, upon the above mentioned land. The plaintiff paid the interest on the mortgage semi-annually from that time until the 26th day of November, 1904, and no interest became due thereon until the 26th day of May, 1905.

4. The German Savings & Deposit Bank, the mortgagee, did not press for the payment of the mortgage, and was willing to continue the loan upon the payment of interest, but upon the 27th day of March, 1905, sold the mortgage and assigned the bond and mortgage to Frederick Schuchman, one of the defendants, and Schuchman caused a judgment to be entered upon it in the Court of Comon Pleas No. 3, at No. 267 May term, 1905, D. S. B., of that court, upon the 14th day of April, 1905, and on the same day issued a writ of *fieri facias*, being 120 May term, 1905, upon the judgment, and caused the land described in the bill to be sold by the sheriff, the land being purchased by Frederick Schuchman for the sum of $104.59 on May 1, 1905.

5. At the time of the purchase of the mortgage by Frederick Schuchman he was treasurer of the plaintiff company, and the other defendants were members of the plaintiff company, and the purchase of the mortgage and the subsequent proceedings upon it resulting in the sale by the sheriff and the purchase of the lands by Schuchman, was by a common understanding before that time had between Schuchman and other defendants, in order to get the title away from plaintiff and into Frederick Schuchman, for his benefit and that of other defendants.

6. At the time of the purchase of the mortgage by Schuchman there were $1,200 unpaid upon the mortgage, $600 having been paid upon it sometime prior to that, and the $1,200 paid by Schuchman to the German Savings & Deposit Bank at the time of the purchase by him of the mortgage, was procured by Schuchman becoming the maker of a note and all the other defendants, endorsers, which note was discounted and the money raised in that way, thus carrying out the understanding between them referred to in the 5th finding of fact.

7. Frederick Schuchman died after the filing of the bill, and left to survive him the following persons, who, as shown by the record, were substituted as parties to the bill: Virginia C. Schuchman, widow; Walter R., Vertram F., Elizabeth V., Flora A., Frederick E. and Gertrude A. Schuchman, heirs at law.

8 The lands described in the bill are in the possession of the plaintiff.

CONCLUSIONS OF LAW.

1. Frederick Schuchman having purchased the mortgage on the lands of plaintiff and caused proceedings to be begun upon it while he was treasurer of the plaintiff company, and under the foregoing facts as found, could not take title to himself, but must be decreed to have taken title in trust for the plaintiff company.

2. Frederick Schuchman having died, his widow and heirs must be held as taking the land subject to this trust.

3. The widow and heirs of Frederick Schuchman should be required to convey the lands to the plaintiff company upon receiving from the plaintiff company the sum of $1,200, being the amount of the mortgage remaining unpaid, together with interest from November 25, 1904.

DISCUSSION.

Little need be said by way of discussion of this case as the facts brought out clearly

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show that Schuchman, while treasurer of the company, conspired with other members of the corporation to purchase the mortgage so as to cause the foreclosure of it, and thereby take the title to the lands of plaintiff away from it, and convert the same either to his own use or the use of himself and his associates. The relation between the defendant, Schuchman, and his associates and the plaintiff company was clearly one of such confidence that the defendant, Schuchman, could not acquire the ownership of the mortgage and thereby by proceedings upon it acquire title to the lands, and so deprive the plaintiff corporation of them. This was a diversion of the property of the plaintiff from the purposes for which the corporation was formed, which, under the ruling of *Bethlehem Borough* v. *Fire Company* 81 Pa. 445, cannot be done. Schuchman took the title in trust for the plaintiff corporation, and neither he nor those claiming under him can be entitled to hold it in their own right, but the property must be restored to the plaintiff to be used for the purpose for which the corporation is created. Defendants will be made whole by having repaid to them the amount that they paid to purchase the mortgage, with interest from the date of the mortgage, and this is really more than that they are entitled to, considering the gross abuse of their confidential relations with the plaintiff.

Let a decree be drawn accordingly.

For plaintiff, *L. L.* and *Ralph C. Davis.*

For defendant, *O'Brien & Ashley.*

Court of Common Pleas,

CRAWFORD COUNTY.

JOHNS v. TRYON et al.

Justice of the peace—Appeals—Appearance—Waiver—Jurisdiction.

An appeal from a judgment of a justice of the peace followed by a general appearance by the defendant, constitutes a waiver of all objections as to the want of jurisdiction of the justice of the peace over the person of the defendant.

No. 119 September Term, 1905. Sur rule for judgment for want of sufficient affidavit of defense.

Opinion by THOMAS, P. J. Filed July 2, 1906.

This action was instituted before a justice of the peace, and it would seem that on the return day of the summons the defendants appeared specially, both in person and by attorney, for the purpose of pleading to the jurisdiction of the justice, for two reasons: First, as to want of jurisdiction for the reason that the summons served upon them did not show or disclose the location of the justice's office; second, as to want of jurisdiction for the reason that the summons was directed to a constable who was not the next constable to the defendants.

After the hearing, in which both defendants were called as witnesses by the plaintiff, a judgment was rendered against the defendants, who thereupon took an appeal and regularly entered the same in this court. On Aug. 7, 1905, plaintiff, by leave of court, entered an appearance *de bene esse.* On Oct. 2, 1905, the plaintiff filed his statement of demand. On March 2, 1906, defendants entered a general appearance by attorney and filed an affidavit of defence in which no defence is raised to the merits of the case, but the two defences raised before the justice are here set up, to wit: lack of jurisdiction in the justice to entertain the cause for the reasons that the location of the magistrate's office was not given in the summons served, and that the same was directed to and served by a constable other than the constable next to the defendants, it being alleged in said affidavit of defence that this court has no jurisdiction to determine the case.

The questions raised are interesting, but in our opinion are not so presented that we can properly consider the same. We have the anomalous situation of defendants appealing to this court and then denying the power and authority to which they appeal to act in the matter.

The matters complained of go to want of jurisdiction of the persons of the defendants, and that defect may be waived in several different ways, and in our opinion was waived in this case by the taking of the appeal; and the only way by which this court could be called upon to give relief for the reasons assigned would have been upon certiorari.

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In 2 Encyc. of Pleading and Practice, p. 614, it is said: "The prosecution of an appeal by a defendant not summoned, and who did not appear, is an apperarance to the action. And where the object of the appeal is to try the case anew in the appellate court on its merits, and to review errors, the taking of an appeal is equivalent to an appearance and gives the appellate court jurisdiction over the person, whether the service of the process before the inferior court was sufficient for that purpose or not."

In the case of *Evans* v. *Duncan*, 4 Watts 24, the validity of a judgment was called into question. It appears that in the suit upon which judgement was obtained but one of two defendants was served. When the case was being tried before arbitrators, the defendant not served appeared, but the report did not show that in his appearance he made himself a co-defendant with the other upon whom the writ had been served; but after the filing of the award, the defendant who had not been served appeared for the purpose of and did take an appeal therefrom. In speaking of the effect of this, the court, Kennedy, J., says: "And if the award had been suffered to remain unappealed from, it might probably have been considered doubtful whether he had appeared before the arbitrators with a view of being considered a co-defendant, and was embraced as such by the award. But after the award was filed in the prothonotary's office, he appeared there within the twenty days allowed by law for that purpose, and entered an appeal from it expressly for himself as well as Mahon. . . . The writ commencing the suit was sued out against him and Mahon jointly, and though not served by the sheriff upon him, he had a right to come in and appear to the action at any time while pending, and take defence as a co-defendant; and having done so, as it would appear in this case, he is bound by the award until it shall be reversed."

In the case of *Weaver* v. *Stone*, 2 Grant 421, it is held that an appeal from an award of arbitrators by defendant, gave him a footing in court equivalent to a formal appearance to the action.

In the case of *Wright* v. *Millikin*, 152 P. S. 507, where the suit originated as an attachment before a justice of the peace, under the foreign attachment act, and the defendant entered bail for the payment of debt, interest and costs, on the taking of an appeal from the magistrate's judgment, it was held that the attachment was thereby dissolved, "and that the appeal and unconditional appearance constitute a complete answer to all objections founded upon an alleged want of jurisdiction of the person."

In the case of *William Fee* v. *The Big Sand Iron Co.*, 13 Ohio St. 563, an appeal was taken from the judgment of an inferior court, and the question as to the sufficiency of the service of the summons upon the defendant was raised, and it was held that by reason of the defective service the lower court did not acquire jurisdiction over the defendant, but "the corporation, by appearing in court and causing notice of its intention to appeal from the judgment to be entered upon the record, thereby appeared in the action and submitted itself to the jurisdiction of the court, and cannot now be permitted, on error, to allege a want of jurisdiction in the court."

In the case of *Wasson* v. *Cone*, 86 Ill. 46, an action was instituted before a justice of the peace and an appeal was taken by the defendant from the judgment there rendered. There was some dispute as to whether the defendant had appeared before the justice, it being clear that if he had he could not object as to want of jurisdiction or defective service. The court, Mr. Justice Walker, in delivering the opinion, says: "But if the justice of the peace had failed to acquire jurisdiction of the person of the defendant, the circuit court undobtedly did by his perfecting his appeal to that court; and, having removed the case to that court, he could not be heard to insist that the justice had no jurisdiction of his person."

It seems very clear to us, both upon reason and on the foregoing authorities, that the defendants not only by taking their appeal, but by entering a general appearance in this court and filing an affidavit of defence to the plaintiff's claim, have brought themselves within the jurisdiction of this court for the purpose of disposing of the case upon its merits, even if the justice had not acquired jurisdiction of the persons of

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the defendants, upon which question we do not pass, for the reason that we consider it wholly unnecessary so to do. In our opinion the proper way to have raised the objections here sought to be interposed would have been upon certiorari.

The rule is made absolute.

For plaintiff, *Biles & Biles.*

For defendant, *C. George Almstead.*

SALVAGE. (NATURE of SERVICE—SALVAGE or TOWAGE.) U. S. DIST. CT. of S. C.—A very interesting case, involving the distinction between a salvage service and mere towage, is that of The Robert S. Besnard, 144, Federal Reporter, 992. It is there declared that if a vessel is in a position which requires towage service only, the mere fact that she had previously suffered injury does not change the nature of the service to one of salvage unless there are some circumstances of peril, immediate or to be reasonably apprehended, from which the vessel is relieved, or some hazard encountered or unusual work done by the relieving vessel. The bark *Besnard*, on a voyage from Montevideo to New York, in the winter, was struck by a waterspout when about 500 miles east of Charleston, losing a part of her masts, and having left only six of her nineteen sails. She was sound in hull, and able with her remaining sails to make five or six knots an hour with favorable winds, but the wind becoming northerly after a day or two, she turned for the port of Charleston. Her master aaked two or three passing vessels for a tow, which he did not get, but at no time nade any signal of distress. One vessel offered to take off himself and crew, which he refused. He reached the vicinity of the Charleston lightship at night, and anchored, all of the crew going to bed except the usual watch. The following marning a tug went out and towed the bark in. The master of the bark endeavored to make a bargain for the towage, but the master of the tug declined and the service was accepted, leaving the matter of compensation open. The master of the tug had received notice the night before from a passing vessel that she had spoken the bark, and that the sea was heavy, but did not go out until the next morning. The wind was no more than fresh, the bark was securely anchored, and was in no unusual peril, and the towage service was not attended with danger, and was no more then required by all vessels entering the port. On these facts the libelant claimed that the service was a salvage, and not a towage. A large number of cases are cited, all based more or less upon a statement made by Dr. Lcshington, in The Reward, 1 W. Rob. 174, where it is said that mere towage service is confined to vessels that have received no injury or damage, and that mere towage reward is payable in those cases only where the vessel receiving the service is in the same condition she would ordinarily be in without having encountered any damage or accident. It is pointed out that this statement is in reality a dictum and that the rule actually applied in the case is not in conflict with that laid down in the present case. Salvage, it is said, is in the nature of a bounty for extraordinary exertions, the amount of the bounty depending upon the success achieved, the value of the property saved, and the degree of danger from which it was rescued, but that while there are many ingredients, the one essential element is that the property shall be saved from danger either actually impending or reasonably to be apprehended, and that in the absence of any peril it is not salvage, however, benficial and meritorious the service may be. Therefore, it is declared that as in the present case the bark was not actually in danger at the time the service was rendered, but had, on the contrary, safely passed through the period of danger and distress, an award for salvage should not be made.

The insurance of a policy of life insurance for $5,000, upon an application for $20,000, is held, in New York L. Ins. Co. v. Levey (Ky.) 5 L. R. A. (N. S.) 739, to be a rejection of the proposition of the applicant, and not binding upon the insurer until assented to by the applicant.

The removal of a tenant, of which the owner has no notice or reasonable opportunity to obtain notice, is held, in Ohio Farmer's Ins. Co. v. Vogel (Ind.) 3. L. R. A. (N. S.) 966, not to constitute a breach of a condition against vacancy.

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ESTABLISHED 1853.

EDWARD B. VAILL, THOMAS EWING, } EDITORS.

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PITTSBURGH, PA., APRIL 10, 1907.

Circuit Court, United States,

WESTERN DISTRICT OF PENN'A.

CITY OF NEW CASTLE v. WESTERN UNION TELEGRAPH CO.

Jurisdiction—State courts—Removal of causes. Amount in controversy—Burden of proof.

The plaintiff, a municipal corporation, filed its bill to compel the defendant, a telegraph company, to change the character of its telegraph line from that of poles and wires to the conduit system. The defendant upon petition had the cause removed to the United States Circuit Court upon the allegations of adverse citizenship and because more than $2,000 was in dispute. Plaintiff then moved to have the cause remanded to the state court for the reason, inter alia, that the matter in dispute did not exceed $2,000, to which the defendant answered denying plaintiff's allegations of value. Held, that there was considerable doubt as to whether the amount in controversy exceeded $2,000 and the burden of showing this jurisdictional fact was upon the defendant which it had failed to do, and consequently the case should be remanded to the state court. See following case.

No. 4 November Term, 1906. In Equity.

Opinion by EWING, J. Filed March 23, 1907.

On May 21, 1906, the plaintiff filed its bill in equity in the court of common pleas of Lawrence county, Pennsylvania, against the defendant, setting forth that the plaintiff is a city of the third class of Pennsylvania, having full police power and the regulation and control of its streets and highways, and that in pursuance of such power it has constructed and established through a small part of its territory, being the closely built up portions of said city, and that part on which the poles and wires most numerously exist and where the public travel is greatest, a certain underground conduit system, and has by ordinance duly enacted required the placing therein of electric wires and cables which heretofore have been suspended on poles along the said streets and highways; that the defendant company has certain lines of poles and wires occupying a portion of the streets of said city in which the conduit system has been established, and after due notice from the authorities to place the said wires within said conduits, has refused to do so; and asking that the defendant be required to remove its said line of poles and wires and place said wires in said conduit, and be restrained from maintaining its said aerial line or system on and along the streets and highways where said conduit system has been established.

The bill was duly served on the 22nd of May, and on the 4th of June the defendant presented its petition to said court, setting forth that the plaintiff is a citizen and resident of the state of Pennsylvania and the defendant a citizen and resident of the state of New York; that the matter in dispute exceeds the sum of $2,000, exclusive of interest and costs, and presenting its bond conditioned for the filing of the record of said case in the Circuit Court of the United States for the western district of Pennsylvania, and for paying all costs that may be awarded by said court, etc., and praying that the petition and bond be accepted and approved and said cause removed to said circuit court; which request was granted by the court, and the record of said cause was thereupon removed into this court.

On September 7, 1906, the plaintiff moved to have the case remanded to the court of common pleas of Lawrence county, Pennsylvania, because, inter alia, the matter in dispute between the parties does not exceed the sum of $2,000, exclusive of interest and costs, and because the matter in controversy is not capable of being valued in money, and, therefore, this court has no jurisdiction.

Upon this petition a rule was granted by this court, to which the defendant answered on November 21, 1906, alleging, inter alia, "that the right of this defendant to maintain its poles and wires and operate the same within the said district of said city of New

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Castle, is of the value of not less than two thousand dollars," and that, "the cost and expense of removing its said poles and wires and placing the same in the said municipal conduits or subways of said city of New Castle would exceed the sum of two thousand dollars."

Both the motion to remand and the answer to the rule granted thereon are verified by affidavit. The defendant has filed no answer to the bill.

It thus appears that the question before the court is one of jurisdiction, viz., whether the matter in controversy exceeds in value the sum of $2,000, exclusive of interest and costs, or whether it is capable of being valued in money.

The petition for removal of the cause having alleged that the matter in controversy does not exceed said sum, that the plaintiff and defendant are citizens of different states, and having been made in time, accompanied by proper bond, the court of common pleas of Lawrence county could not do otherwise than accept said petition and approve said bond. But that was a proceeding wholly ex parte. Now, by the motion made here to remand the cause and the reasons assigned in support of that motion, the question of the amount in controversy in this case is put at issue, and the disposition of this rule depends upon whether or not the defendant has here shown that that amount does exceed the sum of $2,000, exclusive of interest and costs.

Under the authorities the burden of showing this jurisdictional fact rests upon the defendant, and it has offered no proof in support of its allegation of the amount in controversy here, but relies wholly upon the statement in its petition for removal, which statement is nothing more than the simple allegation necessary to obtain that order, when there was no controversy as to the amount involved in the case. The statement in its answer to this rule that its right to maintain and operate its pole line of wires "is of the value of not less than two thousand dollars," is sufficient, even if proved.

The question here is really as to the right of the defendant company to maintain its aerial line of poles and wires in the portions of the city of New Castle now occupied by it in which the conduit system has been established, and consequently, the amount in controversy is to be determined by the value of that right. The plaintiff is seeking no recovery against the defendant, has no demand against it for either money or property, but simply asks that it change the character of its telegraph line from that of poles and wires to the conduit system, and thus does not seek to deprive the defendant of any of its franchise rights in said city, but merely to change and control the manner of the exercise of its rights.

If this is a correct statement of the question involved in this proceeding and of the manner in which the amount in dispute is to be ascertained, it is evidently incorrect to determine that amount, as the defendant has endeavored to do in one statement of its answer, by a calculation of the cost to the defendant company of making the change from one system to the other. Indeed, it may be that the conduit system will prove more valuable, and less expensive to the defendant company than its present one, as is alleged by the plaintiff in the reasons assigned in the motion to remand. But in any event the burden of showing the jurisdictional facts is upon the defendant and it has failed to do more than make the allegation in its petition aforesaid: *Moon on the Removal of Causes*, Sec. 201; *Carson* v. *Dunham*, 121 U. S. 421.

As the matter thus appears, there is considerable doubt as to whether the amount in dispute here is sufficient to give this court jurisdiction, and indeed, whether that amount is capable of anything like a correct estimate or ascertainment, and, therefore, the cause should be remanded and this rule made absolute. *Hutcheson* v. *Bigbee*, 56 Fed. Rep. 229; *Fitzgerald* v. *Ry. Co.*, 45 Fed. Rep. 812; *Winnemans* v. *Edgington*, 27 Fed. Rep. 324; *Huntington* v. *Saunders*, 163 U. S. 318.

Other matters set out in the petition and answer do not appear pertinent to this inquiry and, therefore are not commented upon.

The rule is made absolute and the cause remanded.

For plaintiff, *James A. Gardner.*

For defendant, *J. S. & E. G. Ferguson.*

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Circuit Court, United States, Western District.

CITY OF NEW CASTLE v. POSTAL TELEGRAPH-CABLE CO.

Jurisdiction—State courts—Removal of causes. Grounds for removal—Statement.

A defendant removed a cause to the United States Circuit Court because, inter alia, of the amount in controversy, whereupon the plaintiff moved to have the cause remanded to the state court upon the allegation that the amount in controversy did not exceed $2,000, which the defendant by its answer denied, and further alleged that the matter in dispute arose under the constitution and laws of the United States which alone gave the Circuit Court jurisdiction. Held, that the burden of proof as to the amount in controversy was upon the defendant, which it had failed to establish, and the mere allegations that the matter in dispute arose under the constitution and laws of the United States without a statement of facts upon which said allegations were based and without stating its nature and character was insufficient. Case remanded to the state court.

No. 9 November Term, 1906. In Equity.

Opinion by EWING, J. Filed March 23, 1907.

This case is similar in all respects to that of the *City of New Castle* v. *Western Union Telegraph Company*, in which an opinion has just been filed, except that in the answer on the rule to show cause why the cause should not be remanded the defendant denies that the matter in dispute does not exceed the sum or value of $2,000, exclusive of interest and costs, and avers that a decree granting the relief prayed for by the plaintiff would subject the defendant to expense and damage greatly in excess of the sum of $2,000, exclusive of interest and costs, and that the value of the defendant's rights affected by this suit largely exceeds the sum of $2,000, exclusive of interest and costs, and in addition states that the defendant maintains many thousand offices thoughout the United States for receiving and transmitting messages, from each and every of which intercommunication is had with each and every other office in the United States, including each and every such office in the State of Pennsylvania, that the defendant is therefore engage in interstate commerce, and its poles and wires in the said city of New Castle form a part of the equipment of a through system of telegraph lines over which it transmits messages, not only throughout the United States, but to and from all parts of the civilized world; that by virtue of its compliance with the Act of Congress approved July 24th, 1866, it is authorized to construct, maintain and operate its lines of telegraph over and along any of the post roads of the United States, and that by act of Congress of March 1, 1884, all public roads and highways kept up and maintained are declared to be post roads, and that the said highways passing in and through said city of New Castle are post roads within the meaning of the act of Congress aforesaid, and therefore, that the matter in dispute in this suit arises under the Constitution and laws of the United States, and for that reason alone the case is within the jurisdiction of this court.

Regarding the allegations as to the amount here in controversy, although stated in somewhat different language from that employed by the Western Union Telegraph Company in the case referred to, they amount substantially to the same thing and rise no higher than an allegation of that jurisdictional fact, without any evidence in support thereof, and are therefore met by the allegations of the plaintiff to the contrary. What has therefore been said in the case against the Western Union Telegraph Company is equally applicable here. The burden rests on the defendant and it has not produced the necessary evidence to support its contention.

Its allegations as to interstate commerce and its occupation of post roads are here introduced for the first time, and formed no part of the ground upon which it based its petition for the removal of the cause from the courts of Lawrence county, and moreover, are not supported by any facts which show in what way any question does arise in this case involving any construction of the Constitution or laws of the United States. A mere allegation to that effect, without a statement of facts showing how such question can arise, and the nature and character of it, but rather giving only a legal conclusion, is insufficient: *Gold-Washing & Water Co.* v. *Keyes*, 96 U. S., 199; *Carson* v. *Dunham*, 121 U. S., 426.

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It does not appear, therefore, that there is any better cause in this case for supporting the jurisdiction of this court than in that against the Westrn Union Telegraph Company, and for the reasons above given, in addition to those stated in the opinion filed in the case against the Western Union Telegraph Company above referred to, the rule is made absolute, and the case is remanded.

For plaintiff, *James A. Gardner.*

For defendant, *Rodgers, Blakeley & Calvert.*

Orphans' Court,

ALLEGHENY COUNTY.

In re Estate MARTHA J. CARROLL, Deceased.

Adoption by parol.

Parol adoption by femme covert with concurrence of her husband will carry her estate.

No. 95 June Term, 1906. Exceptions to adjudication of audit.

Opinion by HAWKINS, P. J. Filed February 27, 1907. OVER, J., dissents.

The question which underlies this case is whether or not a married woman may, with the concurrence of her husband, make a parol contract of adoption which will carry her personal estate at death. It must of course be conceded that the right of succession does not depend upon the possession of heritable blood. The undoubted right of a stranger in blood under the law of adoption does not seem to be of statutory creation. The act of 1872 gives express recognition of the existence of "common law" deeds of adoption, and the order of court for which the act of 1855 provides, is said to be simply declaratory of the "intent of the parties" and is therefore a matter of contract. The right of a *femme covert* to make a contract for adoption was settled in *Peterson's Estate, supra.* The difficulty seems to be in the method of proof. The act of 1855 made the record of judicial sanction, evidence; but it was said in *Peterson's Estate, supra,* that an order of court was "not essential to a valid and lawful adoption." So the act of 1872 made the certificate of record of a deed of adoption evidence; but there is nothing in the act which makes this method exclusive; and why should'nt the deed itself be evidence of the fact of adoption as in ordinary cases? And if a deed of adoption be sufficient, why not any other form of contract, whether written or parol, which gives expression to "the intent of the parties?" A man may beggar his family by gift of his substance. He may make sale of his property which in honor and in law will bind him. He may make a testamentary contract for a particular disposition of his estate which will operate as a covenant to stand seized to use: *Taylor* v. *Mitchell,* 87 Pa. 518. And may not his wife do as much with his concurrence? Certainly Mrs. Carroll was bound in honor to fulfill the condition upon which she obtained this daughter. It was to satisfy her maternal yearnings that the negotiations for adoption were begun; it was because of failure of compliance with the consideraton demanded that the negotiations were prolonged more than a year; it was only upon condition of her and Mr. Carroll covenanting to make the child their heir that the parents finally consented to adoption; it was because of her desire to stand first in the child's affection which led her to deny the parents the privileging of visiting their child; and it was the opportunities adoption gave which enabled her to accomplish her purpose of gaining a daughter's love and devotion. On the other hand, the adopted daughter having done her part, why deny her the promised inheritance? Because, say collaterals, the contract was made while Mrs. Carroll was a *femme covert.* In ordinary circumstances she might with the concurrence of her husband have done as she pleased with her personal estate: *Seiper's Estate,* 108 Pa. 373. But the contract had peculiar sanctity because it dealt with human hearts and paternal duties. The father and mother on the one hand sacrificed their claim for what was deemed, and no doubt was, the welfare of their child; and Mr. and Mrs. Carroll on the other, not only assumed parental duties and reponsibilities, but expressly undertook in consideration of the sacrifice, to make the child their heir. The courts have expressly recognized a *femme covert's* right to adopt with,

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(*Peterson's Estate, supra*) or without, (*Forest's Appeal*, 2 Chest. 32), her husband's joinder; and the decree of adoption will carry with it the right of inheritance in both real and personal estate. But it was said in *Peterson's Estate, supra*, that no action by any court appears to be absolutely essential to a valid and lawful adoption; the question was one of intent of the parties. Proof of the fact of adoption followed by consistent relations during Mr. and Mrs. Carroll's life leaves no room for doubt as to the intent, and is certainly the equivalent of any written or record evidence. But if record evidence be necessary, it must be assumed that the proceedings instituted by Mr. Carroll were for her benefit, for as it was at her instance and for her benefit that negotiations for adoption were begun, and upon the strength of her as well as his promises that adoption was in fact made, that will be presumed to have been done which ought to have been done. When it is considered that Mr. and Mrs. Evans have gone down to their graves with the assurance that ample provision had been made by this contract for their daughter; that the adopted daughter had faithfully done her part to the last; and that Mrs. Carroll's purpose had been fully accomplished, the right of inheritance ought to follow in common justice. And there is this additional consideration that in the absence of repudiation of the contract on the part of Mrs. Carroll, her collateral relatives have no status to object.

The cases of *Graham* v. *Graham* and its class do not fall within the principle of adoption and are therefore not precedents for this case.

For accountant, *Thomas M. Benner.*

For exceptants. *Schoyer & Hunter.*

Note.—For former opinion by OVER, J., see page 91 of this volume.

Court of Common Pleas No. 2,

ALLEGHENY COUNTY.

SCHREINER v. CULLEN.

Real estate—Agreement to exchange—Verbal condition—Removing agreement from record.

An agreement for exchange of real estate was executed with a verbal condition that if the property was not satisfactory to plaintiff's wife the agreement should be void. Plaintiff's wife was not satisfied and defendant was so notified but the defendant proceeded to record the agreement. Held, that the agreement was void and being a cloud on plaintiff's title should be removed from the record or it should be noted on the margin of the record that the agreement was void.

No. 953 January Term, 1907. In Equity.

Opinion by YOUNG, J. Filed March 8, 1907.

The bill is for the cancellation of a certain agreement for the exchange of lands, and for the removal of the same from the recorder's office of Allegheny county.

FINDINGS OF FACT.

1. John C. Schriener, the plaintiff, was on the 15th day of June, 1906, the owner in fee of certain lands in the Eleventh ward of the city of Allegheny, described in the first paragraph of the bill, and T. J. Cullen was the owner in fee of certain lands in the Nineteenth ward of the city of Pittsburgh, described in the second paragraph of the bill.

2. Some time prior to June 15th the plaintiff placed in the hands of C. G. Mitchell, a real estate agent, his lands for sale, C. G. Mitchell at that time being agent for the sale of the lands of the defendant, but this fact was unknown to the plaintiff.

3. Mitchell, as the agent of the defendant, prior to June 15, 1906, began negotiations with the plaintiff for the exchange of plaintiff's lands for the lands of defendant, and these negotiations were continued until finally on the 15th of June, the negotiations resulted in an agreement which had been prepared by Mitchell, by the terms of which the defendant agreed to convey by deed of general warranty to the plaintiff, his lands, on or before July 15, 1906, in consideration of which conveyance, the plaintiff agreed by deed of general warranty to convey his lands to the defendant on or before the 15th day of July, 1906, this agreement being marked exhibit A attached to the bill, and at that time plaintiff believed that Mitchell was his agent and did not know that he was agent for defendant.

4. Bert C. Schreiner, plaintiff's wife, was present during the negotiations between

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Mitchell and her husband, and these negotiations extended over some hours, beginning about twelve o'clock at night and ending about three o'clock in the morning, during which time the written agreement, exhibit A, was carefully examined by both husband and wife, and the agreement was finally signed by the plaintiff, and it was there understood between Mitchell and the plaintiff that, inasmuch as Mrs. Schreiner had not yet seen the property and it was being purchased for a home, the agreement was not to be binding upon the plaintiff unless it was satisfactory to his wife, and upon these conditions the agreement was then and there delivered by the plaintiff to Mitchell, who carried the same to the defendant, who within a day or two signed the agreement.

5. Mrs. Schreiner, on the 17th of June, went to the lands of defendant and, having looked them over, concluded they were undesirable and declined to be a party to the exchange, and the plaintiff notified Mitchell to this effect upon the 18th of June, and gave Mitchell an opportunity to persuade Mrs. Schreiner to join in the conveyance, but she refused to do so.

6. On July 14th or 16th, the defendant tendered to the plaintiff a deed of general warranty for his lands and demanded of the plaintiff a conveyance of plaintiff's lands. The plaintiff was willing to accept the deed of defendant if the defendant would take in exchange a conveyance of the lands without the signature of the wife of plaintiff, and this the defendant refused to do.

7. On July 25, 1906, the defendant, having acknowledged the agreement, exhibit A, caused the same to be placed on the records of Allegheny county. On October 12, 1906, the plaintiff by agreement in writing agreed to convey to the Walker Place Land Company, his lands, being the same lands described in the agreement between plaintiff and defendant, and the Walker Place Land Company, having examined the records in the recorder's office of Allegheny county and finding the agreement between plaintiff and defendant, recorded in Vol. 1477, p. 217, refused to accept the deed tendered by the plaintiff until said agreement was cancelled and removed from the record.

8. The agreement, exhibit A, between plaintiff and defendant, recorded as above stated in the recorded's office of Allegheny county, is a cloud upon the plaintiff's title to the lands therein described.

CONCLUSIONS OF LAW.

1. The delivery of the agreement of exchange between plaintiff and defendant, upon the condition that such agreement should be satisfactory to the wife of plaintiff, otherwise the agreement should not be binding upon plaintiff, made the delivery only a conditional one to become good upon the performance of the condition, and there being a failure of the condition, the agreement is not binding upon the plaintiff, and he is entitled to have the same concelled.

2. The agreement upon record in deed book Vol. 1477, p. 217, of the recorder's office of Allegheny county, being a cloud upon the title of plaintiff, and being null and void, should be removed from the record or have marked upon the margin thereof that the agreement is null and void and not binding upon the plaintiff.

Let a decree be drawn accordingly.

For plaintiff, *Edward Schreiner.*

For deffendant, *Robt. T. McElroy.*

MONAGHAN'S CUMULATIVE ANNUAL DIGEST OF PENNSYLVANIA DECISIONS. JAMES MONAGHAN, Editor. SONEY & SAGE, Publishers, Newark, N. J., 1907.

Since 1809 these volumes have been published yearly, giving the gist of the decisions of all reported cases in Pennsylvania for the preceding year. The present volume covers the year 1906. Coming as it does so early in the year it is valuable to all practicing lawyers in order to find quickly the latest decisions. It is a digest that is carefully edited and well indexed.

An injunction against the commencement of an action is held, in Hunter v. Niagara F. Ins. Co. (Ohio) 3 L. R. A. (N.S.) 1187, not to save the running of the statute of limitations, unless the statute so provides.

A statutory exemption of work horses is held, in Tishomingo Sav. Inst. v. Young (Miss.) 3 L. R. A. (N. S.) 693, not to include high-bred horses, used by a man in driving to and from his business and in taking his family riding.

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PITTSBURGH, PA., APRIL 1ST, 1907.

Orphans' Court,

ALLEGHENY COUNTY.

In re Estate of HENRY SUTMEYER, Deceased.

Wills—Widow—Remarriage—Contingent remainders.

Testator died in 1891, testate, leaving a widow and seven children, and provided that his widow should be entitled to one-third of his estate in case she should remarry and the other two-thirds should go to the children absolutely. It was further provided that "in case my wife should not remarry again but live as my widow the whole of my estate both personal and mixed shall be hers so long as she may live; but after her death it shall go to my children in equal shares; should, however, either of my children before such division have died leaving lawful issue, such issue to receive a parent's share." The widow of the testator died in 1906 without remarrying. Held, that the children who died during the lifetime of the mother, without leaving issue, or their representatives, have no interest in the estate, and that distribution must be made in equal shares to the four surviving children and to one daughter of a son who died (leaving a wife to survive him) after the death of the testator and before the death of the testator's widow.

No. 373 September Term, 1906.

Opinion by MILLER, J. Filed December 18, 1906.

The question is, what estate did the children of testator take under his will and the admitted facts?

Henry Sutmeyer died in 1891, testate, leaving a widow and seven children. After providing for the payment of his debts, he directed that his wife, Elizabeth, should be entitled to one-third of his estate in case she should remarry, and the other two-thirds should go to his children; but in case she did not remarry, the provision is as follows:

"3rd. I will and direct that in case my wife should not remarry again but live as my widow the whole of my estate both personal and mixed shall be hers so long as she may live; but after her death it shall go to my children in equal shares, should, however, either of my children before such division have died leaving lawful issue, such issue to receive a parent's share."

He further directed that there should be paid to his mother twenty-five dollars per month so long as she lived. He appointed his wife executrix, and gave her full power to sell his personal or real estate, privately or publicly, and give title thereto.

A son, Albert E. Sutmeyer, died in 1892, after the father and before the mother, unmarried and without issue; another son, Henry W. Sutmeyer, died during the same period married, testate, leaving to survive a widow and one daughter, Ethel Sutmeyer; a daughter, Emma, married to George W. White, died during the same period without issue, testate, making her husband her sole devisee and executor.

The widow of Henry Sutmeyer, Elizabeth, died January 12, 1906; she never remarried.

It is conceded by counsel for Mr. White that if she had died leaving issue the husband would not take. It is also conceded by him that Ethel Sutmeyer, the child of Henry, takes as against her mother. These concessions are irreconcilable with the claim that the husband now takes because his wife left no child; and if the contention is correct that the estate granted to the children of the testator was vested at his death it follows that distribution must be made to the representative of Albert Sutmeyer.

There are no words of present gift preceding the direction that after the death of the widow "it," meaning his entire estate shall go to his children in equal shares. Time was annexed to the substance of the gift as a condition precedent, and the vesting of the estate in the children was suspended: *Bartholomew's Estate*, 155 Pa. 314.

The widow had the whole estate while she lived; during this period there was no right in any of his children therein; the gift to them is inseparable from the direction to pay or divide, and as this direction is future

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and contingent, so is the gift itself; *Moore* v. *Smith*, 9 Watts 403.

It is clear that the testator did not intend a division of the corpus, or that any interest should vest in his children prior to the death of his widow, otherwise the direction that the issue of a deceased child shall take was valueless; the testator was bound to know that in such case he could not direct what should be done with a deceased child's vested estate. There must have been some purpose in his addition of this clause in the third paragraph of his will, in view of the fact that it was omitted from the second. He clearly had in mind two distinct objects in these two clauses, to-wit: That if his widow should marry she should receive one-third and his children two-thirds absolutely of his estate; if she did not marry she was to have the whole estate for life, and after that the children who survived an equal share in the remainder; that those who did not survive should not take, but that their issue should take if they left any. He intended that only his blood, after his wife, should have any interest in his estate; first, his mother an annuity during life, then his children, or the lawful issue of a deceased child; these were the objects of his bounty, and he barred husbands or wives of deceased children dying without issue in the lifetime of the mother.

All the expressions he makes use of, refer to future distribution, a gift in future of his estate. He says that after the death of the widow "it shall go," meaning then, to his children. He further says "should," meaning, if in the future, either of them die before division leaving issue, such issue take. These and similar expressions in his will taken as a whole indicate a clear intent to make, contingent upon the happening of events in the future, the estates distributable to the objects of his bounty; the condition upon which the children took was that of their survivorship, not of the survivorship of the transferee; and this could not be ascertained until after the mother's death. Therefore, until that time the estate was contingent in them, for the persons who were to take could not be ascertained: *Raleigh's Estate*, 206 Pa. 451. The interest of each child was contingent upon his or her living at the death of the widow, when only could it appear whether the distributee is of the class to whom the devise is made: *Mulliken* v. *Earnshaw*, 209 Pa. 226.

In *Carstensen's Estate*, 196 Pa. 326, there was a trust created, the surviving husband to receive the income for life; after his death followed the words, "I give, devise and bequeath the whole estate then remaining to my brothers and sisters;" these words are *in praesenti* and the devise takes effect immediately. Here, following the direction that the wife should have one-third of the estate if she married, or the use of the whole as long as she lived if she did not marry, there are no express present words of gift or devise.

The expression "it shall go to my children" are not the equivalent of antecedent preceding words of gift; the expression shows a clear intent, however, not only that the time of distribution, but the substance of the gift itself is in the future and is governed by the contingency annexed thereto. And there is this further marked difference: the testator devised one-third of his estate to his wife "in case she should marry;" this contingency might have happened until the moment of the widow's death; it is immaterial that she did not marry; her estate and that of the children were contingent upon the happening of that event, which would affect the estates devised, both in proportion and character. This provision must be taken in connection with the next that she took a life estate in case she did not marry; they go together; they are not independent of each other. So long as this contingency existed the estate which the widow or the children took was indeterminate and contingent.

In *Wetherell's Estate*, 214 Pa. 150, the direction as to the second life estate, to-wit: "it shall go" is preceded by the specific words "I give and bequeath." And so in every case in which the distinction between vested and contingent remainders are discussed. The specific words of gift or devise preceding the gift itself are among the elements which are taken into consideration in determining the question.

The children of testator who died before the mother leaving issue did not take a

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vested estate; their issue took under the will of their grandfather as purchasers; those children dying without issue, dropped out of the distribution, because testator intended that the gift should go to no one else during the wife's life, and that none of the children should have any benefit or control therein, unless they survived the mother, and because testator intended that the character of the estate his children or their issue took, and the time of distribution, should remain contingent upon the widow's second marriage. This actual intent when found should govern in a will "exactly as it is in the case of a contract:" *Mulliken* v. *Earnshaw*, *supra*; neither precedent nor words of construction can override the testator's intention: *Redding* v. *Rice*, 171 Pa. 301.

In accordance with the foregoing conclusion it follows that distribution must be made to the four surviving children, and to Ethel Sutmeyer, child of Henry W. Sutmeyer, in equal shares, and that neither of the children who died pending the life of the mother, without leaving issue, or their representatives have any interest in the estate.

Orphans' Court, Allegheny County.

In re SAME.

Vested estate.

In a gift for life to S "but after her death it shall go to my children in equal shares," the latter take vested estates.

HAWKINS, P. J.

MILLER, J., dissents.

STATEMENT.

The question in this case is whether or not decedent's children took vested interests under his will? The material parts of the will are these:

"I * * * * ordain, publish and declare this to be my last will and testament, that is to say:

* * * * * * * * * * * * *

"(2) I will and direct that my wife Elizabeth born Lahm shall be entitled to one-third of my personal and real estate in case she should remarry, and the other two-thirds of both my personal and real estate shall go to his children.

"(3) I will and direct that in case my wife should not remarry again but live as my widow, the whole of my estate both personal and mixed shall be hers so long as she may live, but after her death it shall go to my children in equal shares, should however either of my children before such division have died leaving lawful issue, such issue is to receive the parents share."

The widow did not remarry. Albert and Emma (Mrs. White) died pending the life estate, without issue but Emma testate, and Henry died leaving issue.

OPINION. Filed March 28, 1907.

The difficulty in the application of the rule of distributive words to this case lies in the question of the existence of antecedent gift. What will amount to an antecedent gift must often depend on circumstances. A liberal construction must prevail where the objects of bounty are next of kin because they have a prima facie right of inheritance which can only be taken away by express words or necessary implication, whereas the status of strangers in blood is purely gratuitous: *Phila. Trust Company's Appeal*, 108 Pa. 311. Turning to the present will the question is presented how far testator has modified the natural and statutory rights of his children? In the event of the widow's remarriage, she shall be entitled to one-third of the estate and two-thirds "shall go to" the children. So far the interests given are absolute. The expression "shall go to my children" is plainly dispositive.

In the alternative disposition which follows two changes are made:

(1) The widow is given a life interest in the whole estate followed by a direction that on her death the estate "shall go to my children;" and

(2) A provision that in the event of the death of any of the children "leaving lawful issue" pending the life estate, the deceased parents share should "go to" such "issue."

The ordinary sense in which the expression "shall go to" is used: *Wetherell's Estate*, 214 Pa. 150; the sense in which testator used it in the preceding paragraph; and the relationship of the objects of bounty to testator, show that this expression was again used in the dispositive sense. The only reason for the postponement of the childrens' enjoyment was the provision for the widow. The will spoke as of the date of testator's death, and gave the children vested interests. The cases of *Raleigh's Estate*, 206 Pa. 451,

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and *Mulliken* v. *Earnshaw*, 209 Id. 226, are distinguishable from the present by the apparent intent to ascertain the objects of bounty as of the date of distribution. The gift in *Raleigh's Estate*, *supra*, is to children living at the time of distribution; and in *Mulliken* v. *Earnshaw* to children "then living;" while here the gift to the children is in the first instance, absolute, and this is followed by a defeasance applicable only to those children who may die pending the life estate "leaving lawful issue:" *Carstensen's Estate*, 196 Pa. 325. The words of defeasance being restricted in scope, the will was modified to this extent only, and the shares of Albert and Emma not being within them remained absolute.

For accountant, *A. L. Over.*

For exceptants, *Rodgers, Blakely & Calvert.*

Circuit Court, United States,

WESTERN DISTRICT OF PENN'A.

JUTTE & COMPANY v. STEAMER ISLAND QUEEN.

United States courts—Revised statutes—Sec. 988—Interpretation of—Stay of execution—Pennsylvania act of June 16, 1836.

By the provisions of Sec. 988 of the revised statutes of the United States a defendant in a judgment in the United States courts is only entitled to a stay of execution in those states where judgments by the state laws are liens upon the property of the defendant and where by the laws of those states the defendant is entitled in the courts thereof to a stay of execution by reason of such judgment being a lien. If the defendant has no property upon which the judgment is a lien he is not entitled to a stay in the United States courts.

No. 8 October Term, 1906. In Admiralty.

Opinion by EWING, J. Filed March 23, 1907.

The libellant having obtained a decree in this case, the owner of the defendant vessel thereupon went to the clerk's office and offered bail for stay of execution in accordance with the provisions of the act of the General Assembly of Pennsylvania of June 16, 1836, Sec. 4, claiming the right to do so by virtue of the provisions of Sec. 988 of the revised statutes of the United States. The bail was not accepted, but in order to raise the question after the tender thereof was made, the libellant came into court and obtained a rule on the defendant to show cause why execution should not issue, and this is the matter now before us for consideration.

Said section of the revised statutes of the United States is as follows: "In any state where judgment are liens upon the property of the defendant, and where, by the laws of such state, defendants are entitled, in the courts thereof, to a stay of execution for one term or more, defendants in actions in the courts of the United States, held therein, shall be entitled to a stay of execution for one term."

In Pennsylvania, judgments are liens upon the real estate of the defendant within the jurisdiction of the court in which the judgment is obtained, but not upon the personal property of the defendant, and the third section of the act of June 16, 1836, above referred to provides that, "in all actions instituted by writ for the recovery of money due by contract, or of damages arising from a breach of contract, except actions of debt and *scire facias* upon judgments, and actions of *scire facias* upon mortgages, if the defendant shall be possessed of an estate in fee simple, within the respective county, worth, in the opinion of the court, the amount of the judgment recovered therein, or the sum for which the plaintiff may be entitled to have execution by virtue thereof, clear of all incumbrances, he shall be entitled to a stay of execution, upon such judgment, to be computed from the first day of the term to which the action was commenced, as follows, to wit:

"1. If the amount or sum aforesaid shall not exceed two hundred dollars, six months.

"2. If such amount or sum shall exceed two hundred dollars, and be less than five hundred dollars, nine months.

"3. If such amount or sum shall exceed five hundred dollars, twelve months."

And the fourth section of the same act provides that, "Every defendant in any judgment obtained as aforesaid . . . . if . . he shall give security to be approved of by the court, or by a judge thereof, for the sum recovered, together with interest and

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costs, he shall be entitled to the stay of execution hererinbefore provided, in the case of a person owning real estate."

It is because of these provisions of the Pennsylvania act of 1836 that the defendant here claims that the right to stay of execution is conferred by said Section 988 of the revised statutes.

It seems that the question has never heretofore arisen in this court, and the counsel in the case have been unable to find any reported case in which it has arisen elsewhere. The question is therefore with us one of first impression.

It strikes me that a fair construction of said section of the revised statutes of the United States is that in states where judgments are liens upon the property of the defendant, and by the laws of that state the defendants are entitled, in the courts thereof, to a stay of execution by reason of the judgment being a lien upon such property of the defendant, that then, and only then, and for the same reason, namely, that the judgment is a lien upon the property of the defendant, the defendant shall be entitled to a stay of execution in action in the courts of the United States held in such state, for the period of one term; and that this construction involves the conclusion that if a defendant has no property upon which such judgment is a lien, he is not entitled to a stay of execution in the courts of the United States, notwithstanding the laws of that state may provide for stay of execution by defendants who have no proporty upon which judgments against them would be a lien, upon their entering security.

It thus appears to me that this section of the revised statutes should be interpreted as if it read as follows: "In any state where judgments are liens upon the property of the defendant, and where, by the laws of such state, defendants are entitled, in the courts thereof, to a stay of execution for one term or more, *by reason of such lien*, defendants in actions in the courts of the United States, held therein, shall be entitled to a stay of execution for one term."

Thus if, in the present case, the defendant, possessed real estate upon which the judgment or decree in this case is a lien (which does not appear), then such stay of execution might be allowed under the provisions of said section 988, but allowed only because of the lien of such judgments upon such real estate, and of the provisions in the act of 1836, providing for such stay under those circumstances.

If the intent and purpose of said section of the revised statutes of the United States was to enable the defendants in judgments obtained in the courts of the United States, to obtain stay of execution thereon in accordance with the general laws of the state in which such courts are held, it would not have been necessary to specify in said section that such stay should only be allowed in cases where such judgments are liens upon the property of the defendants, for, as we have seen, in this state that is not a prerequisite to a stay of execution by the defendant, for he can enter security therefor, notwithstanding he may have no property at all, and obtain such stay.

What could have been the purpose in providing that only in states where judgments are liens upon the property of the defendant such stay of execution can be had, except to obtain the benefit of such lien and to place the defendant, upon whose property judgments in the United States courts are such liens, in the same position in which he would have been had the judgment been rendered in the state court? If that is not the purpose of this section, it is difficult to see why any reference is made to the judgment being a lien upon the property of the defendant, and if that *is* the purpose of said section, it then follows that defendants in judgments in the United States courts, in states where judgments of the state courts are liens upon the property of the defendants, shall have only such rights as to stay of execution as those accorded to them by the state courts, by reason of such lien.

If this construction of the act be correct, there can be no stay of execution taken by the defendant in this case, as has been attempted.

In this view of the case it is not necessary to determine what is meant by "one term," whether it is the period of six months (the duration of one term in this district) from the return day of the writ, or one term after

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that to which the writ is returnable; since the conclusion reached is that the defendant is entitled to no stay at all.

The rule is therefore made absolute.

For libellant, *Reed, Smith, Shaw & Beal.*

For appellant, *L. C. Barton.*

RIGHTS OF MINORITY STOCKHOLDERS. The Supreme Court of Illinois in Dunbar v. American Tel. & Tel. Co., 79 Northeastern Reporter, 423, passes upon several questions relating to monopolies and the rights of minority stockholders. It is held that a company cannot purchase in its own name the majority of the capital stock of another company for the purpose of controlling the latter and preventing competion, and further that the purchase in the name of others as agents or trustees will not relieve the transaction of its illegal aspect. The court further upholds the right of minority stockholders to test the validity of such transactions, stating that the minority stockholders of the purchased corporation might come into equity to restrain the purchasing company from voting the stock which it illegally held. The court adds that aside from the fact that the purchase was beyond the power of the purchasing corporation, the complainants would be entitled to equitable relief, for the reason that the purchasing company would maintain a board of directors for the purchased corporation, which would act in the real interests of the purchaser, thereby injuring and finally destroying the interests of the purchased corporation. This is held to be fraud against the stockholders of the latter.

INSUFFICIENCY OF PUBLIC WATER SUPPLY AT FIRE. In Mugge v. Tampa Water-Works Co., 42 Southern Reporter, 81, it is shown that the city contracted with the water-works company to supply water for public use in the extinguishment of fires, etc. Plaintiff's building having caught fire was destroyed because of a lack of pressure in the water mains, action was brought against the water-works company for the loss. The Florida Supreme Court reviews at length the decisions of other courts which are in decided conflict, and holds with those which maintain that the water-works company under such circumstances is liable in an action of tort for the damage suffered.

RIGHT OF LABORERS TO ORGANIZE. The evidence in the case of Pickett v. Walsh, 78 Northeastern Reporter, 753, shows that it had been the custom in the City of Boston for over one hundred years to employ separate men to do the pointing up of brick work, terra cotta and stone masonry, and that the bricklayers' and masons' unions, desiring to obtain this work for themselves, prohibited their members from working for any contractor who let the work of pointing up to others than members of the union. An action was brought by the pointers to enjoin the officers of the union from conspiring to interfere with and destroy their business. The Supreme Court of Massachusetts holds that the unions may lawfully compete for the additional work, and may lawfully strike if the work is not given to them. The Court adds, however, that the unions could not legally strike merely because the contractors employing union men were working on a building on which work was being done by non-union pointers employed by the owners, inasmuch as organized labor's right of coercion is limited to strikes on persons with whom the organization has a trade dispute. The court gives a very interesting discussion on the right of citizens to pursue their calling as they may see fit, and the limitations upon this right as it may affect other citizens.

The rule that the statute of limitations does not run against a state is held, in Eastern State Hospital v. Winton (Va.) 3 L. R. A. (N. S.) 746, aplicable in favor of a claim by a hospital, which is a mere agency of the state, owned and controlled by it.

Where a bankrupt in Georgia, who has been allowed the constitutional exemption of $1,600, re-engages in buisness, it is held, in Matter of Jeffers, 17 Am. B. R. 368, that he is not entitled, upon filing a second petition, to a second homestead exemption as the head of a family, but he ought not to be left entirely destitute, $100 worth of household and kitchen furniture which he has scheduled will be ordered set apart as extempt.

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PITTSBURGH, PA., APRIL 24, 1907.

Court of Common Pleas No. 1,

ALLEGHENY COUNTY.

O'CONNOR v. MONONGAHELA INSURANCE CO. et al.

Sale of stock—List of stockholders—Right of administrator to list.

An administrator, whose duty it is to sell certain stock of the decedent, has a right to demand of the officers of the corporation issuing the stock an inspection of the list of stockholders where the reason for obtaining such list is for the purpose of aiding him in selling the stock and it appears that the stock is owned by a few persons only, that it has no fixed market value and that the information cannot be harmful to the corporation and will be of distinct value to the administrator.

No. 467 March Term, 1907.

Opinion by MACFARLANE, J. Filed April 8, 1907.

FINDINGS OF FACT.

1. Under the stipulation of counsel, filed February 23, 1907, I find the following facts: The petitioner, and the decedent, was a resident of the city of New York in the state of New York, and the petitioner now holds as administrator 448 shares of the capital stock of the Monongahela Insurance Company at a par value of $50 per share, the total issue of stock being 3,500 shares. The petitioner is the duly appointed administrator in the city of New York, and it is his duty to convert the said stock into cash by sale thereof.

2. The petitioner, by his counsel, R. B. Ivory, Esq., applied to the defendant company for leave to examine the list of stockholders therein and to take a copy thereof and stated his reason to be that he believed a better price could be obtained for the stock from stockholders living in the vicinity of the home office of the company, which is located in Pittsburgh, than could be obtained if it were offered at a public sale or to strangers who know little about the company and the value of the stock, and that it was important to the petitioner and necessary to the faithful discharge of his duty to ascertain the names of some of the stockholders in order to solicit an offer from them for the said stock.

3. The company refused either to submit its books to the inspection of the said Ivory, as counsel for the plaintiff, or to give a list of the stockholders.

4. The Monongahela Insurance Company was incorporated about the year 1857 by the state of Pennsylvania and has been engaged in business since that time in this county and state, and its stock has been bought and sold in this county.

5. At the time of the filing of the petition there was not an option upon the plaintiff's stock given by him to R. B. Ivory, Esq.

OPINION.

We doubt the propriety of the practice in this case, but it seems best to dispose of the case under the agreement of counsel, as there is really but one question of fact in dispute, and that is whether there was an option on this stock to Mr. Ivory, and it does not seem necessary to delay the disposition of the case until the judges of this court return from the quarter sessions, especially as we may not have a jury until next September.

It is not my purpose to discuss the cases or the principles involved at any length. I have examined the cases in this state with care, aided by the authorities cited in the briefs, and I think our own cases are ample for the decision of the question before me, especially the cases of *Commonwealth* v. *Phoenix Iron Co*, 105 Pa. 111; *Phoenix Iron Co.* v. *Commonwealth*, 113 Pa. 563; *Commonwealth* v. *Empire Passenger Ry. Co.*, 134 Pa. 237, and *McClintock* v. *Young Republicans*, 210 Pa. 115. The last case and the law requiring railroad companies to keep a list of stockholders show that there is nothing sacred about a list of stockholders, and it is not in any way against public policy that the names be disclosed to a stockholder when he wishes the information for a proper

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purpose. There is here no dispute, no proposed or pending litigation and nothing involving the interests of the company itself, and the sole advantage sought is to increase the plaintiff's opportunity for disposing of the stock. It appears that there are some who are willing to buy the stock, but the petitioner entertains the belief that other stockholders may be willing to buy, if he can reach them, and his idea is by no means absurd. It is a well known fact that investors who are satisfied with their stock in a corporation very commonly add to their holdings in the same company, and there are many so-called "close" corporations in which the stock is held by a small number and the general public does not buy or sell it, and the only possible buyers are those already holding the stock. In such cases to refuse the information as to the stockholders would give to the officers or to a coterie of "insiders" almost absolute power and an undue advantage. The purpose here is therefore not out of curiosity, but it is for the purpose of obtaining a distinct advantage to a stockholder. If he exposed his stock to public sale it would tend to depreciate it. He may know its book value but not know what would be a good selling price, and his duty to his trust is plainly to make every reasonable effort to find possible purchasers, and in a company such as this seems to be he would be justly criticised did he not try to learn who the stockholders were. To give him this information is in no way harmful to the interests of the company, and the refusal seems to be merely arbitrary. Nevertheless, the company may stand on its legal rights if it chooses to do so, and the case is not disposed of on any other grounds than that I am clearly of opinion that the purpose for which this information is sought is a proper one within the meaning of the authorities.

That information may be demanded for this purpose in every case does not necessarily follow, for there are many corporations whose stock has a well known market value and is bought and sold in the open market so frequently that the most advantageous method is to sell in that manner and the information would not be of any special value.

The plaintiff is entitled to a writ.

For plaintiff, *Ivorg, Kiskadden & Moore.*

For defendant, *J. W. Stoner.*

Court of Common Pleas No. 2,

ALLEGHENY COUNTY.

FUCHS v. EICHENLAUB.

Food—Sale—Domestic animals—No implied warranty.

In the sale by a dealer of food for domestic animals there is no implied warranty as to the quality of the food.

In the absence of neglect the dealer is not responsible for the bad effects of the food on the animals.

No. 285 July Term, 1902. Sur motion to take off non- suit.

Opinion by FRAZER P. J. Filed June 4, 1906.

On October 1, 1901, plaintiff, who has a dairy farm in Shaler township, purchased from defendant, a flour, grain and feed dealer in Allegheny, a bag of feed known as middlings. That evening a portion of the middlings was mixed with malt and fed to cows. The following morning the animals were found to be sick and suffering pain. Within a few days eight died. An autopsy showed food eaten by the animals had caked in their stomachs and caused considerable inflamation. It did not, however, show the immediate cause of the deaths. This action was brought to recover damages for plaintiff's loss, the allegation being that the middlings purchased from defendant was impure and caused the death of the cows. At the trial we directed a compulsory non-suit. It seems to us plaintiff was not entitled to recover for three reasons: first, because he failed to show a warranty that the middlings was pure and healthful; second, the evidence failed to show the death of the cows was the result of their eating the middlings, and third, if the middlings was impure, there was contributory negligence on plaintiff's part in feeding same. In the case of sales of food for family use there is always an implied warranty that such food is reasonably pure and wholesome.

In sales of food for domestic animals,

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however, there is no such implied warranty. Of course, if the evidence had shown the middlings purchased by plaintiff to be impure and the impurity to have been known by defendant, a sale, under those circumstances, without disclosing the defect to plaintiff, would render defendant liable for any damage plaintiff might have sustained. Such circumstances, however, do not exist in this case. Defendant is a reputable dealer and purchases his stock from wholesale dealers and millers who manufacture mixed feed. In this case the middlings came to defendant in bags tightly sewed, and was purchased by plaintiff in the original packages without either warranty or opportunity for examination, and there is not the slightest evidence tending to show that defendant had knowledge that the middlings was impure or adulterated. The *Am. & Eng. Enc. of Law*, Vol. 15, p. 1239, after discussing and citing cases where a warranty of articles sold will be implied, says: "The courts have refused to extend the rule (of implied warranty in cases of food sold for family use) to food sold for consumption by domestic animals, holding that the rule is recognized on the grounds of public policy for the protection of human health." This appears to be the rule adopted by the courts in every state in the Union except one. While we have not been referred to any case in this state in which the question here involved was passed upon, the courts of other states have considered it. In *Lukens* v. *Frieund*, 27 Kan. 664, it was held that a miller was not liable in damages to a farmer to whom he sold bran in which copper clasps had accidentally fallen before the sale and were swallowed by a cow in feed prepared from the bran, and from the effects of which she died. In *Julian* v. *Laubenberger*, 16 Misc. Reports (N. Y.) 646, it was held that in a sale to a consumer, of food sold in cans, by one who did not prepare the same, there was implied warranty that the food was wholesome and fit for use. And in *Ryan* v. *Ulmer*, 16 W. N. C. 121, our Supreme Court says: "Where there is no knowledge on the part of the vendor of goods of their defective quality, although no opportunity of inspecting them is given the vendee, the sale itself raises no implied warranty of quality or even of merchantibility on which the vendee can sue if the goods prove worthless." Other authorities might be cited to the same effect. These, however, we deem sufficient to sustain the contention that there is no implied warranty in cases where food is sold for domestic animals, especially under the circumstances of the sale in the case before us. Aside from the question of implied warranty, in our opinion the testimony failed to show with reasonable certainty that the middlings was impure when purchased from defendant, and also that it caused the death of plaintiff's cows. Even if such were the case, the testimony of plaintiff and his witnesses convict him of contributory negligence in feeding it. Both plaintiff and his witnesses testified that the middlings when examined in the barrel into which it was emptied was found to be almost black in color, and full of sand or some other gritty substance, while pure middlings is "white and feels soft and smooth when taken in the hand," one witness testifying, "If I had got it, I never would have fed it to my cows." Under these circumstances if plaintiff had used ordinary care, he could easily have discovered the defect in the food and avoided his loss. Any way we look at this case, it seems to us plaintiff has failed to establish his right to recover.

The motion to take off the non-suit is refused.

For plaintiff, *M. R. Trauerman.*

For defendant, *Chas. F. McKenna.*

(Common Pleas No. 2, Allegheny Co.)

RODE & CO. v. ARCADE LAND IMPROVEMENT CO.

Lease—Market house—Filling vacant places—Cancellation of lease.

A leased space in a market house being built on representations that the building would be filled up with first-class stands. The owners failed to get tenants for the building and gave up the attempt. Held, that A was entitled to have the lease cancelled and to recover damages on account of improvements made.

No. 232 January Term 1907. In equity.

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Opinion by OVER J., specially presiding. Filed January 12, 1907.

The purposes of this bill are to have a lease entered into between the parties cancelled or rescinded, and damages alleged to have been sustained by the plaintiff, assessed against the defendant.

FINDING OF FACTS.

1. Prior to February 19, 1906, Joseph M Johnston, John Hodgson, F. W. Wernke, James A. Penney and William A. Seifert, all of McKeesport, Pa., owned as tenants in common a lot in McKeesport on which they erected a one-story building for the purpose of sub-dividing it into market stalls intending to form a corporation to take the title, which was to lease stalls and establish a market in the building, and the plaintiffs who were retail dealers of pickles, condiments and similar goods in the Allegheny market, began negotiations with the said Johnston and the other owners for the lease of space in the building in which to establish a stand for the sale of pickles, condiments and similar goods.

2. The said owners of the building organized a corporation known as the Arcade Land & Improvement Company on February 12, 1906, taking all the stock therein and being the officers and board of directors thereof, and conveyed to it by deed dated February 19, 1906, the said lot and building for the consideration of $60,000.

3. The said corporation executed a lease to the plaintiff for a stand in said building for a period of two years and two months, for the rental of $50.00 per month, payable in advance, the said lease containing the provision "that should the said A. Rode & Company desire an extension of this lease for a period of three years from the termination of this lease and the said Arcade Land & Improvement Company refuse to grant the same, the said Arcade Land & Improvement Company agrees to pay said A. Rode & Company the sum of $2,000 upon said default, and the said A. Rode & Company upon the receipt of the sum of $2,000 agrees to grant, bargain and sell by such writing or agreement as the said Arcade Land & Improvement Company may require, the booth or stand in said building to said Arcade Land & Improvement Company, said booth or stand not embracing moveables, such as knives, forks, dishes, etc."

4. The plaintiffs were induced to enter into said lease by the representations of the said Joseph M. Johnston, John Hodgson, F. W. Wernke, James A. Penney and William A. Seifert made prior to the formation of the corporation, that it was their intention and that of the company to be organized by them, to establish a first class market, with none but first class tenants in the building, and that there were then a large number of applicants for the spaces in said building. These representations were true and the defendants made every reasonable effort to establish a first class market in the building, filled with first class tenants, but failed to do so until August 30, 1906, when these efforts ceased, and the defendants refused to rent stalls in the building, and its intention then was and now is to get possession of the building for the purpose of selling it or renting it as a whole.

5. The plaintiffs erected a stand in the space leased by them in said building at a cost of $1,350.00, in which they now are and have carried on their business since March 3, 1906. Said stand if now removed from the building would be worth one hundred dollars, and the damages which would be sustained by the plaintiff if compelled to remove it, allowing one hundred dollars for depreciation in value since its erection would be $1,150.00.

6. There are fourteen spaces for market stands in said building, and only two have been occupied since the filing of this bill.

CONCLUSIONS OF LAW.

Although the representations made to the plaintiffs upon the faith of which they entered into this lease were then true, yet the defendants were bound by them to make every reasonable effort to establish a first market filled with first class tenants in the building during the continuance of the lease, and as it failed to do so, and does not intend to, the plaintiffs have the right to have the lease cancelled; but as they have occupied the stand and carried on business therein they must pay rent therefor until possession is delivered to the defendant.

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The plaintiffs do not appear to have sustained any damages by reason of defendants failure to endeavor to carry out its intention to establish a market in the building, except the loss they may sustain by removing the stand and fixtures erected by them in the building, and as by reason of the defendants default they have the right to have the lease cancelled and must then vacate the premises and remove the stand and fixtures, the defendant is liable for these damages.

Let a decree be drawn accordingly.

For plaintiff, *Wm. C. Boyd* and *M. H. Stevenson.*

For defendant, *Wm. A. Challener* and *O. K. Eaton.*

Court of Common Pleas,

WASHINGTON COUNTY.

BELL et al v. MOREDOCK.

Marketable title—Adverse possession.

Plaintiffs and those under them had actual, adverse, continued, visible, notorious, distinct, hostile and exclusive possession of a tract of land for a period of more than forty-five years and entered into an agreement in writing to sell to the defendant the Pittsburg and River Vein of coal and certain mining rights underlying said tract of land and complied with all the requirements of the written agreement and presented their deed and demanded the purchase money. Defendant refused the deed on the grounds that the abstract of the title showed no record title for a period extending from 1791 to 1890. And in a case stated it was agreed between the parties that the plaintiffs had had actual, adverse, continued. visible, notorious, distinct, hostile and exclusive possession, control and enjoyment of the premises for a period of more than forty-five years.

Held, the title was marketable and judgment for plaintiffs.

No. 98 May Term, 1907. Case stated.

Opinion PER CURIAM. Filed April 13, 1907.

There can be no question about it being well settled law that "*a complete title can be gained by the statute of limitations and when gained becomes absolute and as perfect as though the party gaining it filed it under a written conveyance.*"

The possession giving such a title by the statute of limitations must be actual, continued, visible, open, notorious, distinct, adverse and hostile, and such possession must continue unchallenged by any legal action or adverse entry for the full period of twenty-one years.

"The case stated" in its eleventh paragraph sets out that it is to be taken as a fact found to be true that Stephen Cooper took possession of the land which the plaintiffs have contracted to sell to the defendant more than *forty-five* years ago, that he claimed and used it as his own and was in *actual, adverse, continued, visible, notorious, distinct, hostile* and exclusive possession, control and enjoyment thereof from the date of the inception of his possession therein to June 29, 1879, when he entered into a written agreement to convey the same in fee as his own to his son, David Cooper; that David Cooper, as his vendee under said written agreement, entered into possession, claiming it as his own in fee by this purchase and continued in possession until March 3, 1890, when he and his wife conveyed in fee said land to Robert Bell (his heirs and assigns) who then entered into possession of said land claiming title thereto by reason of said conveyance. After the purchase money of the sale by Stephen Cooper to David Cooper by written articles of agreement was fully paid by David Cooper and Robert Bell, the administrators c. t. a. of the estate of Stephen Cooper, conveyed said land in fee simple to the said David Cooper; this was in July, 1905, (after he had made his deed to Robert Bell of date March 3, 1890,) and to confirm his title then conveyed to Robert Bell, he gave his (Bell's) executors (Bell having died in May, 1897,) a quit-claim deed for said land dated September 1, 1905, and they executed a quit-claim deed to the heirs at law of the said Robert Bell who are now the owners of the title to said land and in possession thereof claiming to own the same under the said Stephen Cooper, and it is further stated as a fact found to be true that during the forty-five years since Stephen Cooper took possession of said land no entry has been made nor action of ejectment or any

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action whatever brought by any claimant to recover said land or any part thereof from the said Stephen Cooper or from any of those who have held under him, to wit, David Cooper, Robert Bell, Robert Bell's executors and the heirs at law and devisees of Robert Bell who are the plaintiffs in this case.

Taking all the facts stated in the case submitted for the opinion of the court to be found as true and in the nature of a special verdict found after hearing by a jury, we are of opinion that the plaintiffs have a good marketable title in fee for the Pittsburgh or River Vein of coal underlying said tract of land of which Robert Bell died seized and the mining rights which they have contracted to sell and convey to the defendant, and that on the case stated, the defendant admitting that the facts therein stated are true, they are entitled to a judgment against the defendant for the sum of $15,730.40 upon filing with the prothonotary of this court such a deed of conveyance for said vein of coal and mining rights as is called for by the contract.

And now, April 13, 1907, it is ordered that this opinion be filed, and upon the filing af the deed of conveyance named in the contract of sale existing between the parties hereto, judgment will be entered in favor of the plaintiffs and against the defendant for the sum of fifteen thousand seven hundred thirty dollars and forty cents and costs of this action.

NOTE: It will be understood that this decree as an adjudication can only affect the rights of those that are parties to the case stated and who admitted the truth of the facts therein found to be true.

For plaintiffs, *Albert S. Sprowls* and *B. B. Barr.*

For defendant, *H. R. Myers.*

[From Harry Russell Myers, Esq., Washington, Pa.]

BANKRUPTCY DISCHARGE—JUDGMENT IN CONVERSION. It has been held, in Fechter v. Postel, 17 Am. B. R. 316, that a judgment rendered in an action for conversion against one subsequently adjudicated a bankrupt, is released by his discharge.

COMPUTATION OF PER DIEM COMPENSATION. The question of what constitutes a day's work for which compensstion should be allowed under statutes providing that state and county officers shall receive no stated salary but be allowed a per diem compensation for their services, is passed upon by the North Dakota Supreme Court in State v. Richardson, 109 Northwestern Reporter, 1026. The county commissioners were allowed a stated sum for the time they were necessarily employed in the duties of their office, and mileage for the distance actually traveled. The commissioners had been accustomed to charge the county for overtime when they were out on their official duties at night, and also to charge mileage for one day going from meetings. As the result of this practice one commisioner had collected for not less than 36 days' services in one month. This practice the court says cannot be upheld under the law, as there is no provision that less than 24 hours shall constitute a days' work.

The discharge of accused, not brought about by procurement of complaining witness nor attended by circumstances involving his conduct, is held, in Davis v. McMillan (Mich.) 3 L. R. A. (N. S.) 928, not to be evidence of want of probable cause, in an action against such witness for malicious prosecution.

It has been held, In re A. B. Carton & Co., 17 Am. B. R. 343, that a bankrupt who fails to exercise his right of insisting that his trustee shall object to the proof of certain claims, upon the ground that they were uniformly exaggerated, is upon his application for a discharge, estopped from claiming that the claims were wrongfully allowed for the greater amount.

It has been held, Matter of West, 17 Am. B. R. 393, that a joint conveyance to husband and wife vests in them an estate in entitety, and where the property is mortgaged by them at a time when the husband is insolvent, to secure his debt to a third person, a claim of the wife against her husband's estate in bankruptcy, for the full amount of the mortgage, as an unsecured debt, may not be allowed in the life time of the husband, as, until his death, he has as much right to the land as she.

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PITTSBURGH, PA., MAY 1, 1907.

Circuit Court, United States,

WESTERN DISTRICT OF PENN'A.

LARKIN v. CITY OF ALLEGHENY AND PENNSYLVANIA COMPANY, Intervenor.

City of Allegheny— Councils—Parks—Power to sell—Act of June 7, 1901—City contracts—Parties to.

Under the decisions of the courts of the United States and also by the provisions of the act of June 7, 1901, P. L. 491, the city of Allegheny has the right to grant the use of a portion of its commons for the right of way of a railway company and also for the erection thereon of a passenger station.

The provisions of the act of June 7, 1901, requiring the city solicitor of a city of the second class to prepare all city contracts and endorse thereon his approval are purely directory and the neglect or refusal of that official cannot avoid a contract otherwise properly executed.

There is nothing in the act of June 7, 1901, requiring the head of the department of public works to execute a contract for the sale of part of its park property to a railroad. A fair interpretation of the 15th article of that act indicates that the contracts necessary to be executed on behalf of the city "by the city recorder and the head of the proper department" are those incidental to the ordinary conduct of business of the several departments, such as for work and material, and not the unusual and more comprehensive ones which embrace matters of general municipal government.

No. 25 May Term, 1905. In equity.

Opinion by EWING, J. Filed April 12, 1907.

The plaintiff is a resident of the city of New York and the owner of a lot in the city of Allegheny at the corner of East Diamond and Erie streets. The city of Allegheny is a city of the second class and governed by the provisions of the act of assembly of Pennsylvania of March 7, 1901, P. L. 20, and the supplement of June 20, 1901, P. L. 586.

This bill was filed April 7, 1905, and duly served, and on May 1, 1905, the Pennsylvania Company filed its petition for leave to intervene, which was granted by order of May 26, 1905, and the answer of said intervenor was filed July 13, 1905. On July 14, 1905, complainant filed an amendment to the bill, to which the intervenor demurred on July 22, 1905, and on October 10, 1905, the demurrer was overruled without prejudice, and on October 25, 1905, the said intervenor filed its answer to said amendment.

The bill sets forth a brief history of the city of Allegheny and refers particularly to the fact that when it was first laid out 100 acres of ground were set apart for a common pasture, which have since been improved as a park and has been for many years and is now enjoyed by the public and dedicated to public use, the title to which ground was vested in said city by act of assembly of April 13, 1840, creating what had theretofore been the borough of Allegheny into the city of Allegheny, and alleging that notwithstanding the title of the city of Allegheny in said common and the rights and interests of the public therein, the mayor, councils and executive officers of the city of Allegheny threaten and intend to relinquish the rights of the city and of the public therein, and in pursuance of such wrongful intention an ordinance has been passed by the councils of said city and is now before the mayor thereof awaiting his approval, a copy of which is as follows:

"An Ordinance to authorize the proper officials for and on behalf of the city of Allegheny to enter into a contract with the Pennsylvania Company operating the railway of the Pittsburgh, Fort Wayne and Chicago Railway Company for the granting to the said Pennsylvania Company and the Pittsburgh, Fort Wayne and Chicago Railway Company, their successors and assigns, the right to occupy and use for certain purposes a strip of land in the city of Allegheny, west of Federal street and south of Stockton avenue, commonly known as South Park

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and originally known as the Common Ground of said city.

"Section 1. Be it ordained and enacted by the select and common councils of the city of Allegheny, and it is hereby ordained and enacted by the authority of the same, That the proper officials of the said city be and they are hereby authorized and empowered in the name and on behalf of the said city of Allegheny, to make and enter into a contract with the Pennsylvania Company, lessee of and operating the railway of the Pittsburgh, Fort Wayne and Chicago Railway Company, in the form following, to wit:

CONTRACT.

"This agreement made this — day of —, A. D. one thousand nine hundred and five, between the city of Allegheny, hereinafter called the City, as first party, and the Pennsylvania Company, lessee of and operating the railway of the Pittsburgh, Fort Wayne and Chicago Railway Company, hereinafter called Railway Company, as second party; witnesseth:

"Whereas, By an Ordinance dated October 12, 1853, the Ohio & Pennsylvania Railroad Company, predecessor in title to the Pittsburgh, Fort Wayne & Chicago Railway, was granted a right of way through certain lots in the city of Allegheny, and the same right of way was continued through the Common to Federal street; and

"Whereas, The Pennsylvania Company, lessee of and operating the Pittsburgh, Fort Wayne & Chicago Railway, has in accordance with its contract with the city of Allegheny dated the 1st day of November, 1901, and for the safety, security and convenience of the public, duly elevated the grade of its tracks over and across Federal street in said city and partly as a result of such track elevation and partly on account of the growth and development of the city, there has arisen a necessity for a larger, better and more modern passenger station at Federal street; and

"Whereas, The Pennsylvania Company being desirous of conforming fully to the requirements of said city in respect thereto, has duly submitted plans for a passenger station of such character and size as would be a credit to the city and in every way satisfactory to the public and the Company except that in order to better serve the convenience of both, it is desirable that the general waiting rooms, etc., thereof should be larger and more commodious and the driveway and approach thereto wider, and it is greatly to the interest of the public and of the city that such a station thus wholly suitable and satisfactory should be constructed and maintained at this point; and

"Whereas, In order to properly attain such result it is necessary for said Pennsylvania Company to occupy and use for building purposes a small portion of the said rights of way hitherto granted as aforesaid and also the narrow strip of the common ground or South Park remaining between the new south line of Stockton avenue, as lately widened by said city, and the line of the grant made to the said Ohio & Pennsylvania Railroad Company by said ordinance dated October 12, 1853, which said strip of land has been so reduced in width by said city as to be no longer in any way adapted to or valuable for park purposes.

"Now, therefore, This agreement witnesseth: That for and in consideration of their respective covenants hereinafter set forth, it is agreed by and between said parties as follows, to wit:

"First. That so far as their right to so do exist the city hereby grants to the Pennsylvania Company as lessee and the Pittsburgh, Fort Wayne & Chicago Railway Company as lessor, their successors and assigns, the right to occupy and use for the relocation and reconstruction of the passenger station, buildings, sheds, tracks, driveways and other appurtenances suitable for the accommodation of their business in connection with the proposed new station at Federal street, that part of the South Common Ground or South Park described as follows:

"Being a strip of land bounded on the east by Federal street, on the north by the present south line of Stockton avenue, on the west by the west side of Sherman avenue prolonged southerly across said South Park or Commons, and on the south by land of the said Pittsburgh, Fort Wayne & Chicago Railway Company.

"Second. The Railway Company agrees at its own cost and expense to construct,

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maintain and use a suitable passenger station at such point in accordance with the plans submitted and approved and identified by the signatures of the engineer of the Pennsylvania Company and of the director of the department of public works of said city, together with sheds, platforms, driveways and other appurtenances necessary thereto.

"Third. The Railway Company agrees, at its own cost and expense, to construct and maintain a substantial stone wall with coping and iron fence from the west side of Federal street to a connection with the present wall at or near Sherman avenue.

"Fourth. The Railway Company agrees that within six (6) months after the execution of this agreement it shall and will begin work on the said station and shall and will prosecute the same to completion with due diligence so that the same shall be finished within a period of one (1) year from the time the work is commenced.

"Section 2. This ordinance shall not go into effect until the contract herein provided for shall have been duly executed by the Pennsylvania Company within thirty (30) days from the passage of this ordinance."

The complainant further avers that the property proposed to be diverted from the public use, by the said ordinance, and the agreement made in pursuance thereof, is of great value and the proposed alienation thereof is wholly without authority of law and would be a fraud upon her and other taxpayers and freeholders of said city, and praying that the rights of the city of Allegheny in said property described in said ordinance be declared and affirmed, that the city of Allegheny, its officers and servants, be restrained by injunction from executing the contract set out in said ordinance and from conveying, releasing or otherwise impairing the title of the said city of Allegheny to the said property by deed or any other instrument of writing executed and delivered to said railway company, and for general relief.

By the amendment she sets forth that said acts of 1901, governing cities of the second class, provide that all contracts shall be in writing, signed and executed in the name of the city by the city recorder and head of the proper department, and that the city solicitor shall prepare all contracts to be made with the city or with any of its departments and endorse on each his approval of the form thereof, and alleging that in this instance the department of public works is the proper department having control of a contract of this character, and that the head thereof did not sign and execute in the name of the said city of Allegheny, or otherwise, the contract mentioned in the bill of complaint, and that the city solicitor did not in fact prepare the contract mentioned nor did he endorse thereon his approval of its form.

The answers of the intervenor to the original bill and the amendment thereto allege that the ordinance referred to was not passed with any wrongful intent, and avers that it was for the welfare, comfort and accommodation of the citizens of Allegheny and the traveling public generally and will redound to the benefit of the public of said city, and denying that the same is a fraud upon the plaintiff and other taxpayers and freeholders of said city, and, while admitting that the head of the department of public works did not sign and execute the contract in the name of the city of Allegheny and that the head of the law department of said city did not prepare said contract, nor endorse thereon his approval of its form, denies that the proper department in this case for approving the contract in controversy is the department of public works.

The city of Allegheny has filed no answer and the case is before us simply on bill and answer of the intervenor, pursuant to a stipulation of counsel of November 15, 1905, providing that the allegation of plaintiff's residence and ownership of improved real estate in the city of Allegheny shall be admitted and the case set down for final hearing on bill and answer.

The case was argued January 16, 1907, and the questions then presented and now considered are: first, whether the city of Allegheny has the power and authority to make such a contract; second, whether the contract must be prepared and the form thereof approved by the city solicitor; third, whether the contract must be executed by the head of the department of public works of said city; fourth, the standing of the plaintiff to maintain this bill; fifth, the

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laches of the plaintiff in filing the amendment to the bill.

The early history of the city of Allegheny and of its commons may be found briefly stated in the cases of *Commonwealth* v. *Rush*, 14 Pa. 186; *Bell* v. *Ohio & Pennsylvania Railroad Co.*, 25 Pa. 161; and *City of Allegheny* v. *Ohio & Pennsylvania Railroad Co.*, 26 Pa. 355, to which cases for that history reference is hereby made. In addition to what may there be found, reference is also made to the act of April 1, 1858, P. L. —, which provides that the councils of Allegheny may pass an ordinance or ordinances to improve the common ground in said city and keep the same improved, and for that purpose appropriate the whole or any part thereof, on paying damages to such commoners entitled thereto as may apply for the same, and that they may enclose and improve said common grounds and provide penalties to protect the same from encroachment or injury; and to an ordinance passed by said city, pursuant to said act of assembly on May 6, 1858, providing that, "the common grounds in the city of Allegheny be appropriated for the purpose of improving and keeping the same improved; and they are hereby declared to be so appropriated on paying damages to such commoners entitled thereto as may apply to have damages assessed."

The legal principles declared in the cases above cited are also adopted and reaffirmed in the late case of *Murray* v. *City of Allegheny*, 136 Fed. Rep. 57. By these cases it is decided that the granting of the use of a portion of said common ground for right of way for a railroad and for the erection and maintenance thereon of a passenger station is a grant for a public use and within the power and authority of said city.

In addition to these decisions the act of assembly of June 7, 1901, P. L. 491, provides, "That the municipal and other corporation or public officers, or authorities owning or having charge of any park or public grounds in cities of the first and second class, may enter into an agreement with any railroad company, maintaining and operating a railroad within this state, defining and fixing the manner, terms and conditions upon which such park or public grounds, or any portion thereof may be used and occupied by said railroad company with its tracks and passenger-station buildings."

The question, therefore, of the right and power of the city of Allegheny to make the proposed contract with the intervening company seems to be *res adjudicata*. In the argument some stress was laid upon the fact that the proposed contract grants "the right to occupy and use for the relocation and reconstruction of the passenger station, buildings, sheds, tracks, driveways and other appurtenances suitable for the accommodation of their business in connection with the proposed new station at Federal street, that part of the South Common Ground or South Park described as follows, i.e., the contention being that the authorities cited do not go further than to authorize the city to grant the right of way for the tracks and the ground necessary for a passenger station, while, it is alleged, that this contract embraces also buildings, sheds and driveways and other appurtenances suitable for the accommodation of the railroad business. But this argument overlooks the fact that all through the contract and in all the pleadings in the case it is expressly stated that the purpose of the contract is simply to accommodate the change of line necessitated by the elevation of the tracks and to provide for a new passenger station suitable for such track elevation, and of sufficient size and proper conveniences to properly accommodate the traveling public. It must be assumed that the buildings, sheds, driveways and other appurtenances referred to are simply and only those which are necessary constituents of a passenger station, and for ready and convenient access thereto. It is certainly not understood by those terms that the intent or purpose is to allow the railroad company to erect upon the ground buildings merely for their own convenience.

Sheds in connection with a passenger station are understood to mean merely the protection afforded along station platforms for incoming and outgoing passengers, and if the station were to be limited for driveways merely to the public street or thoroughfare upon which it may be erected, it would naturally result that at any station where a considerable amount of travel is conducted, as is the case here, that thoroughfare would

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be greatly obstructed and the public thereby greatly inconvenienced. It is therefore a relief to the traveling public, both those seeking transportation on the railroad and and those conducting business along the ordinary thoroughfare, to have convenient driveways and approaches to the station apart from the public street, and it is certainly putting the ground to a public use.

With, therefore, the question of the right of said city to grant the use of a portion of its commons for railroad track and passenger station purposes already determined by the cases above cited and by the direct enactment of the legislature aforesaid, and with the understanding that these are the only purposes for which it is intended to use the ground in controversy, it is adjudged that the contract proposed is within the power and authority of the city of Alleghney to make.

The provisions in the acts of 1901 regarding the duties of the city solicitor are purely directory and the neglect or refusal of that official to perform certainly cannot avoid a contract otherwise properly executed. It is only the form and not the substance of a contract which he is directed to approve, and the preparation of a contract is largely mere clerical labor which any one might perform. It certainly could not be contended that a contract prepared by some other person and the form approved by the city solicitor would be invalid simply because he had failed to prepare it. In like manner it may be stated that his failure to approve the form of a contract which was satisfactory to the proper officials about to execute it would not invalidate it after execution. His failure to approve might absolve him from any resulting responsibility for the form of the contract, but would not relieve the city from its obligation.

When this bill was filed the ordinance embracing the contract was yet before the mayor, awaiting his approval thereof, and what, if anything, has been since done regarding it does not appear. The ordinance provides for the execution of the contract by "the proper officials of the said city." It is admitted that the head of the department of public works did not execute it, but he may yet do so if the contract remains unexecuted and he is the proper party to join in its execution.

In any event, the heads of the various municipal departments are appointed by the mayor and confirmed by select council and it is but reasonable to conclude that any contract authorized by councils and approved by the mayor, requiring the signature of any such department head, would be readily signed by him; and if he refused to do so, the contract being a proper one, he certainly could be compelled to execute it. The mayor and councils constituting the supreme city officials, it cannot be doubted that the execution of any proper contracts authorized and directed by them can be enforced.

If "the proper officials of the said city" have executed, or do yet execute, the said contract, pursuant to said ordinance, and no others are authorized or empowered to execute it, or if it yet remains unexecuted, that is the end of the question as to the proper execution of the contract. If other than "the proper officials" have assumed to execute it, that fact should be disclosed together with the reasons therefor. Who are such "proper officials" is, in the present status of this case, a mere academic question, for the prayer of the bill is for an injunction against execution of the contract.

It seems evident, however, that the contracts referred to in article 15 of the act of March 7, 1901, as necessary to be executed on behalf of the city "by the city recorder and the head of the proper department," are those necessary in the ordinary conduct of the business of the several departments, such as for work and materials, etc., and not the unusual and more comprehensive ones, which embrace and refer to matters of general municipal government, rather than to those of any particular department. The whole context of the clause of said act relied upon by the plaintiff indicates this. If the construction contended for by the plaintiff were correct, there could be no contract with the city without the execution thereof by the head of some one of the various departments of its government, but the act in question really contemplates others, for in article 9, defining the duties of the city solicitor, it is stated that he shall "prepare

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all contracts to be made *with the city* or any of its departments."

Although the head of the department of public works of the defendant city may have charge of the public grounds of the city, yet the contract here proposed does not involve anything pertaining to his work or supervision beyond relieving him of a portion of the public ground over which he has charge.

The only particular right this plaintiff had in these commons was that of pasture and when such use was made of these commons was so long ago that it is practically beyond the memory of the present residents of that city. In addition to this non-user for so long a period, since the ordinance of May 6, 1858, above referred to, the city has taken charge of and used these grounds for a public park, and to that use alone have they been applied since that time. By such non-user and this adverse control and use of the parks, the plaintiff has long since lost whatever right of pasture she and her predecessors in title once had. At this time, therefore, her right is nothing more than that of the general public.

In view of what has been already said the complaint of laches regarding the filing of the amendment in this case is without any special importance. But it may be stated that in view of the fact that the ordinance provides that the contract in question shall be executed by "the proper officials of the said city," the intervenor could not well assert any laches respecting the substance of said amendment, for it relates only to the proper execution of said contract, which the ordinance, as stated, itself requires. It therefore follows that the Pennsylvania Company was by that ordinance advised at the time of its passage that said contract should be properly executed, and if it should accept it without such proper execution it could hardly complain if it was subsequently called to account for so doing. Moreover, as already stated, what, if anything, has been done since the passage of the ordinance is not disclosed.

It follows, therefore, from what has been said that the injunction must be refused and the bill dismissed. Counsel may prepare a decree accordingly.

For plaintiff, *J. M. Stoner* and *D. F. Patterson.*

For intervenor, *Dalzell, Fisher, Young, & Hawkins.*

ADMISSION OF ATTORNEYS. The question as to the power of the legislative branch of the government to establish qualifications and regulate the admission of attorneys is passed upon by the Supreme Court of North Carolina in the matter of Applicants for License, 55 Southeastern Reporter 635. The court, after reviewing numerous authorities, holds that a statute prescribing qualifications does not violate the constitutional provision that the legislative branch of the government shall have no power to deprive the judicial department of any power or jurisdiction which rightly pertains to it. In re Day, 181 Ill. 73, 54 N. E. 646, is opposed to this holding. An effect of the North Carolina holding is that one presenting the certificate of two attorneys as to good moral character is entitled to admission without investigation by the court on this point, even though his character be attacked by formal charges.

A plaintiff who abandons a suit in which defendant has been arrested on mesne process, before it is entered in court, is held, in Gibson v. Holmes (Vt.) 4 L.R.A. (N.S.) 451, not to be able to justify under the writ in an action by defendant for false imprisonment.

The power of a county, in the absence of express legislative grant, to enter into a contract for the employment of a tax ferret, is denied in Stevens v. Henry County, Ill., 4 L.R.A. (N.S.) 339, even though the duty of discovering untaxed property has not been placed upon the public officials.

A contract between an attorney and client for services to be rendered by the former is held, in Stroemer v. Van Orsdel (Neb.) 4 L.R.A. (N.S.) 212, not to be necessarily invalid because a part of the services to be rendered is the procurement of legislative action, nor because such contract provides for a contingent fee.

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ESTABLISHED 1853.

EDWARD B. VAILL, THOMAS EWING, } EDITORS.

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PITTSBURGH, PA., MAY 8, 1907.

Court of Common Pleas No. 2,

ALLEGHENY COUNTY.

BOROUGH OF KNOXVILLE v. BOROUGH OF MT. OLIVER.

Boroughs—Streets dividing boroughs—Jurisdiction of borough—Equity.

The rule that a municipality has exclusive control of its streets does not apply to a street which is the dividing line of two boroughs, one-half of the street being in each borough.

In such a case the court will restrain a borough from so narrowing its part of the roadway as to prevent teams passing outside the streetcar tracks and throw most of the traffic onto the other side.

No. 495 January Term, 1907.

Opinion by FRAZER P. J. Filed March 5, 1907.

The purpose of this bill was to restrain the defendant borough from contracting, or narrowing, the roadway of Southern avenue by locating the curb-line in the present roadway, thereby interfering with vehicle traffic upon that side of the avenue and imposing a disproportionate burden upon plaintiff borough. From the bill, answers and proofs we find the following facts:

FINDING OF FACTS.

1. The borough of Knoxville is a municipal corporation duly incorporated in the year 1877. August Belsmeyer and Charles Goettler are residents of that borough and owners of property therein located on the western side of Southern avenue.

2. The borough of Mt. Oliver is a municipal corporation duly incorporated and organized in the year 1892. Charles Ott and Matthew Ott, the other defendants, are contractors employed by the borough of Mt. Oliver to grade and pave that portion of Southern avenue within its limits.

3. Southern avenue was formerly the Birmingham and Brownsville Macadamized Turnpike Road. It is a main highway between the southern portion of the county and the city of Pittsburgh. The vehicle travel upon it is large and street cars pass at intervals of from three to four minutes. It is fifty feet in width and divides the boroughs of Knoxville and Mt. Oliver, one-half of the street being in each borough.

4. The Birmingham and Brownsville Macadamized Turnpike Road Company was a corporation organized under a special act of Assembly, approved February 15, 1851, P. L. 56, by which act it was given power to lay out, construct and complete a macadamized turnpike road between Josephine street in the city of Pittsburgh and the village of Whitehall in Baldwin township, Allegheny county, a distance of about six miles, "following as nearly as practicable the course of the old Brownsville road." The act or incorporation further provides that the road shall not be less than fifty nor more than sixty feet in width. The road as laid out by the company was opened for travel within a year or two after the passage of the act of 1851.

5. The act of incorporation contains no direction that a plot of the road shall be anywhere recorded or made public or that the location of the road shall be marked in any way or any survey of it recorded. No plot or survey of the road was put on record at the time it was laid out or for some fifteen years thereafter, nor does any such survey appear to have been in the hands of the company. In the year 1867 or 1868 a survey of the road was made by J. W. Patterson, a civil engineer, and a map or plan of the same made and lodged in the office of the clerk of quarter sessions, which map was indexed in the state road index. The map, which had been lost for some time, was produced upon the trial and has since been returned to the office of the clerk of courts.

6. At No. 783 July Term, 1898, a bill in equity was filed in this court by the Birmingham and Brownsville Macadamized Turnpike Road Company against a number of persons owning property abutting upon its road. The bill set forth that a controversy had arisen between the Turnpike Road

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Company and certain abutting property owners as to the lines of the turnpike road, and asking that a decree be made determining such controversy. Subsequently, by amendment, all owners of property abutting upon the line of the road, except possibly three persons who are now objecting, were made parties to the proceeding. Upon hearing, and after a survey had been made, a decree was filed June 17, 1899, at the above number and term, fixing the width of the road at fifty feet and establishing its lines and the property lines of abutting owners. That decree seems to have been satisfactory to all parties to the proceedings, no exceptions having been filed thereto or appeal taken therefrom.

7. In 1890 the Suburban Rapid Transit Street Passenger Railway Company, a corporation created under the act of 1889, which company is now leased to and operated by the Pittsburgh Railways Company, with the consent of the Birmingham and Brownsville Turnpike Road Company and also the supervisor of the township of Lower St. Clair, laid its tracks upon the turnpike road and began operating thereon a street passenger railway, and continued to occupy the same and operate its cars thereon, upon the tracks originally laid down, until the year 1899, after the decree referred to in the previous finding was made, when, with the consent of the Turnpike Road Company, and without objection on the part of property owners, the tracks of the Railway Company were moved to the center of the road as fixed by that decree, where they have since remained and are at present.

8. In the year 1900, at No. 24 September Sessions, 1900, of the Court of Quarter Sessions of this county, upon proceedings duly had, the property and franchises of the Birmingham and Brownsville Turnpike Road Company were condemned and appropriated by the county of Allegheny, and thereupon that portion of the road dividing the boroughs of Mt. Oliver and Knoxville became subject to the jurisdiction of those boroughs respectively; that is, the north half of the road became a highway of the borough of Knoxville and the south half a highway of the borough of Mt. Oliver.

9. The tracks of the Pittsburgh Railways Company, from outer rail to outer rail, occupy 15.2 feet of the avenue, which leaves 17.4 feet for roadway and sidewalk in each borough clear of all obstructions. To avoid accidents and interferences by vehicles with the cars of the railway company there should be in each borough a roadway between the tracks and the curb of the sidewalk of not less than nine feet. A sidewalk eight feet wide would be ample in width to accommodate travel in that locality, and would be as wide as such walks generally are in either borough and especially in Mt. Oliver.

10. The borough of Knoxville has recently improved its portion of Southern avenue by adding to its width for both sidewalk and road purposes a strip of ground taken from abutting property ranging from six and one-half feet to ten feet in width. It has also paved its roadway with vitrified brick, and has put down stone walks five feet wide with a two and one-half foot space on each side, which space has been sodded.

11. The curb-line as established by the borough of Knoxville is distant from the outer rail of the railway tracks, as follows: At Bausman street, 15 feet 4 inches; at a point midway between Bausman and Matthew street, 16 feet; at Matthew street, 16 feet; at a point immediately south of the Hilltop Brewery, 14 feet 8 inches; from Morse street to the line of the borough of Carrick, 12 feet 4 inches.

12. The borough of Mt. Oliver has by an ordinance recently passed established the width of sidewalks in the streets of the borough, and is about to improve that portion of Southern avenue within its limits. In making such improvement the borough proposes to widen the present sidewalk and decrease the width of the present roadway. To that end it has located the curb-line between Carbon street and the Hilltop Brewery at Matthew street at a distance of nine feet from the outer rail of the railway tracks. Immediately north of the brewery property the curb-line is located five feet and one inch from the outer rail, at the first angle north of the brewery five feet and four inches from the outer rail, at Morse street seven feet and four inches from the outer rail, and from that point to the Car-

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rick borough line from five to seven feet from the outer rail.

13. The proposed widening of the sidewalk and contracting of the roadway by the borough of Mt. Oliver upon its side of Southern avenue will not leave sufficient space for vehicle traffic between the car tracks and the sidewalk north of the property of the Hilltop Brewing Company; such location will render the use of that side of the avenue more or less dangerous and annoying and force travel to the Knoxville side of the avenue, thereby imposing additional and disproportionate burdens on that borough.

14. If additional ground is required for sidewalk and roadway purposes on the Mt. Oliver side of Southern avenue, the same can be obtained, without interfering with buildings except in two instances, at a comparatively small expense.

CONCLUSIONS OF LAW.

1. What is now Southern avenue is and always has been the dividing line between the plaintiff and defendant boroughs. Previous to the year 1900 the highway was a turnpike road owned by the Birmingham and Brownsville Macadamized Turnpike Road Company, neither borough having any jurisdiction over it until that year, when the road was appropriated by Allegheny county and made a free highway. Thereupon each borough claimed and assumed jurisdiction over one-half of the road. The width of the road at the time of its appropriation by the county was fifty feet, the tracks of the Pittsburgh Railways Company being laid in the middle of the highway and occupying a space between outer rails of 15.2 feet, leaving for roadway and sidewalk purposes in each borough between the railway tracks and the property lines a space of 17.4 feet. The borough of Knoxville has widened its side of the street by adding to it a strip of ground from six and one-half to ten feet in width, which was taken from abutting property, and has improved both the roadway and sidewalk by paving and curbing, the width of the roadway since its improvement on that side of the street between the car track and the curb being from twelve and one-third to sixteen feet. The borough of Mt. Oliver now proposes to improve its one-half of the street and in so doing intends contracting the space at present used as roadway, in its limits, by locating the curb-line between Matthew street and the Carrick borough line at an average distance of about five and one-half feet from the outer rail of the car tracks, this location being for the purpose of providing a sidewalk ten feet in width.

2. The question for determination is, our right to restrain the borough of Mt. Oliver from contracting the width of the roadway of Southern avenue to such an extent as to make it impossible for vehicles to either stand or be driven between the car track and sidewalk without being interfered with by the cars of the Pittsburgh Railways Company. As a general rule municipalities have the sole control of their streets and may determine the width of sidewalks and roadway. While this rule applies to streets entirely within a city or borough, we have not been referred to any case where it has been applied to a street which is partly in two adjoining boroughs. In such cases it seems to us each municipality owes a duty to the other and is bound to keep its part of the street in such condition that the entire street may be used equally by the citizens of each borough and the public generally. When Southern avenue came under the jurisdiction of the two boroughs, its lines and the lines of abutting property owners had been definitely and satisfactorily fixed by a decree of this court. It was fifty feet in width, which left ample room outside of the car tracks for roadway and sidewalks in each borough. Under these circumstances it became the duty of each borough to preserve and keep in repair its portion of the avenue so as not to interfere with the use of the highway in its entirety. Each borough accepted its one-half of the road as it was in location and condition at that time, and neither has now a right to make changes, either in grade or by encroachments or obstructions that interfere with the full use of the street, nor can either borough use its portion so as to cast upon the other any duty which creates an unequal burden upon the other. If the borough of Mt. Oliver is permitted to occupy a portion of the roadway with its sidewalk, vehicle travel upon

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that side of the avenue will practically cease and be forced to the Knoxville side where the roadway can be used without annoyance and interference from street cars. The increased use of the Knoxville side of the avenue would necssarily impose upon that borough additional expense for repairs and perhaps require additional police protection, burdens which Mt. Oliver has no right to cast upon it. In *Rothwell* v. *California Borough*, 24 Superior Court 234, it was held that where a road was the dividing line between a borough and township each was charged with the duty of keeping its portion in repair so that the road could be used in its entirety. Applying the principles laid down there to this case, we are of opinion that the proposed location of the curb-line of the borough of Mt. Oliver in the present roadway of Southern avenue is an obstruction or encroachment that will cast an additional and unequal burden on the borough of Knoxville, and therefore should be enjoined.

In reaching the above conclusion we are not to be understood as holding that the borough of Mt. Oliver should widen its side of Southern avenue as Knoxville has done. We merely hold that the roadway between car tracks and sidewalk must not be contracted or obstructed to such an extent as to render its use by vehicles unsafe or annoying and thereby force a disproportionate share of travel upon the Knoxville side of the avenue.

Let a decree be drawn accordingly.

For plaintiff, *W. D. Grimes* and *S. M. Myers.*

For defendant, *J. W. Kraus* and *Carney & Martin.*

District Court, United States,

WESTERN DISTRICT OF PENNA.

In the Matter of JOSEPH A. LITTLE, Bankrupt.

Jurisdiction—State courts—Federal courts.

A made an assignment under the Pennsylvania Insolvent Act of 1901, and following said assignment certain creditors filed a petition to have him adjudged bankrupt under the Federal Bankruptcy Act. A was duly adjudged a bankrupt, and B, who was the assignee, and under the jurisdiction of the Court of Common Pleas of of Washington county, Pennsylvania, was elected trustee at a meeting of the creditors held in pursuance of a notice from the referee in bankruptcy. On a rule to show which court had jurisdiction of the bankrupt estate, held, Federal court has jurisdiction.

No. 3426. In Bankruptcy.

Opinion by EWING, J. Filed April 2, 1907.

On December 3, 1906, Joseph A. Little made an assignment to R. H. Meloy for the benefit of his creditors, without preference, under the Pennsylvania Insolvent Act of 1901. On January 7, 1907, the said Little, upon petition of certain creditors alleging said assignment as an act of bankruptcy, was duly adjudged a bankrupt in this court. At a meeting of his creditors subsequently held the said R. H. Meloy, assignee as aforesaid, was chosen trustee of the bankrupt estate.

On February 19th, upon the petition of T. W. Wood & Sons, creditors of said bankrupt, the referee granted a rule on said Meloy to show cause why he should not turn over to the jurisdiction of this court all the property of said bankrupt in his hands as assignee as aforesaid, to which he filed an answer setting forth said assignment for the benefit of creditors, claiming that he should be allowed to complete the settlement of the assigned estate, and alleging that there was no law whatever, in the absence of fraud or preference among creditors, which would nullify an assignment under the state laws, and that it would be to the advantage of the creditors and in accord with the desire of the greater number of such creditors in the amount of their claims to have the estate settled and distributed under said Pennsylvania act of 1901.

Upon this rule the referee found the facts substantially as above stated and concluded with the opinion that the bankruptcy proceeding superseded the proceedings under the assignment and directing that said Meloy should within five days file his acceptance or refusal to act as trustee, and, upon acceptance, to file a bond in double the amount of the estate and, as soon as qualified as trustee, to demand of the assignee under the

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proceedings in the state court all property in his hands, and permitting him to file in the state court an account of the assigneeship up to the date of the adjudication in bankruptcy, January 7th last.

To this finding the said assignee filed exceptions and asked that the matter be referred to the court for determination.

Clause 67 e of the bankrupt act of 1898 specifies, "That all conveyances, transfers, assignments, or incumbrances of his property, or any part thereof, made or given by a person adjudged a bankrupt under the provisions of this act subsequent to the passage of this act and within four months prior to the filing of the petition, with the intent or purpose on his part to hinder, delay, or defraud his creditors, or any of them, shall be null and void as against the creditors of such debtor, except as to purchasers in good faith and for a present fair consideration; and all property of the debtor conveyed, transferred, assigned or encumbered as aforesaid shall, if he be adjudged a bankrupt, and the same is not exempt from execution and liability for debts by the law of his domicile, *be and remain a part of the assets and estate of the bankrupt and shall pass to his said trustee, whose duty it shall be to recover and reclaim the same by legal proceedings or otherwise for the benefi tof the creditors.*

Commenting upon this clause Brandenburg on Bankruptcy, section 1100, states, "A voluntary general assignment for the benefit of creditors, with or without preferences, made within the prescribed four months, is constructively fraudulent and void, though innocent as a matter of fact. Its purpose is to 'hinder, delay and defraud' creditors, within the meaning of this subdivision, because its necessary effect is to defeat the operation of the bankruptcy act, by depriving creditors of the choice of a trustee, of the summary jurisdiction of the bankruptcy court and of the ample control which the law intended to give them over the estate of their insolvent debtor." See also the authorities cited under this section.

The same section further states, "In this case the assignee takes no title against the creditors, but is a mere naked bailee for them without a shred of title or lawful authority to the possession of the bankrupt's estate," and authorities there cited.

In addition to these authorities and those cited by the referee in his findings and opinion, the case of *Bryan*, as *Marshal*, v. *Bernheimer*, 5 Am. B. R. 623, appears to be directly in point, both as to the character of the possession of the assignee under a general assignment for the benefit of creditors and as to the authority of the court summarily to require a delivery of possession of the bankrupt's property in his hands to the trustee in bankruptcy.

Moreover, in this case the assignee under the general assignment for the benefit of creditors and the trustee in bankruptcy chosen by the creditors are one and the same individual, who has voluntarily submitted to the jurisdiction of this court. What he apparently seeks to do is to settle and make distribution as assignee of the property obtained under the assignment aforesaid and to take possession of, settle and distribute as trustee in bankruptcy any additional property which the bankrupt may have. This would make two insolvent proceedings out of one and the same estate and under different jurisdictions, which is anomalous to say the least. There is no real difficulty whatever in relieving himself from responsibility under his bond as assignee, because the referee has provided that he can settle an account in the state court of that stewardship up to the date of the bankruptcy, and under the decisions of the state courts there would be no difficulty in having an order obtained in that court releasing him from further obligation upon his turning over to the trustee in bankruptcy the balance of the estate in his hands so that the same may be dully administered in the bankruptcy proceedings.

The exceptions to the action of the referee are overuled and his order affirmed.

For petitioner, *J. N. Patterson.*

Court of Common Pleas,

WASHINGTON COUNTY.

MORRISON v. HENDERSON

Appeal—Rule to strike off—Justice of the peace. Act of June 24, 1885.

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In a suit before a justice of the peace plaintiff obtained judgment for $4.75 less than was sued for and took an appeal and gave bail for costs. Defendant asked for rule to strike off appeal for the reason the appellant did not pay the costs accrued in the case before the justice before taking his appeal and the amount adjudicated in said judgment adversely to the appellant was not in a sum sufficiently large to entitle him to an appeal. Rule made absolute and appeal stricken from the record.

No. 133 August Term, 1906. In re rule to strike off appeal.

Opinion PER CURIAM. Filed April 18, 1907.

James A. Morrison sued Robert A. Henderson before a justice of the peace to recover "$18.25 balance due for corn and oats sold and delivered" by him to Henderson.

The defendant at the trial claimed a set-off of $26 for driving 4,800 shingles. The justice after hearing entered judgment in favor of the plaintiff for $13.50—$4.75 less than the claim sued for. Plaintiff took an appeal giving bail for all costs accrued and that may be legally recovered against the appellant. On the transcript of appeal filed it is noted by the justice "costs not paid except cost of appeal."

The defendant obtained this rule to have the appeal stricken from the record on two grounds: First, the appellant did not pay the costs accrued in the case before the justice before taking his appeal; second, the amount adjudicated in said judgment adversely to the appellant is not in a sum sufficiently large to entitle him to an appeal.

First. The act of June 24, 1885, provides that a justice in case of appeal shall be entitled to demand and receive from appellants the cost accrued before making and delivering the trasncript. The accrued costs belong usually to the justice, the constable and the witnesses. This act was evidently passed for the benefit of all persons interested in accrued costs. It holds that the giving of a transcript of appeal by the justice cannot be taken as a waiver of the provisions of the act that there are more than he interested. Nor do we think it can fairly be inferred that even the justice waives his rights under this act by giving a transcript of appeal where he notes on the transcript as in this case, "*Costs not paid except cost of appeal.*" This is notice to the appellant and to the court made on the record by the justice that the appellant had not complied with the provisions of the act of June 24, 1885.

In the cases of *Acor* v. *Acor*, 20. Pa. C. C. 244; *Greer* v. *Pool*, 21. Pa. C. C. 521; *Euyeart* v. *Surch*, 18 Pa. C. C. 606 and *Carbaugh* v. *Landers*, 13 S. C. 361, it is held that the payment of the accrued costs before a justice in case of an appeal is not optional either with the appellant or the justice. The act was passed as we have said, in the interest of all parties entitled to costs and the duty is on the appellate court to see that their rights are protected, and this is done by striking off the appeal when the act is disregarded.

What we have so far said is not seriously questioned by the appellant's counsel in this case, but he contends that the recognizance given is eduivalent to payment. This proposition in our opinion is not tenable. There may be *payment* of a debt in other ways than with "current coin of the realm" but it is only where both parties, the payer and payee, so intend it, and the burden is on the one making such a claim to prove this intention. In the case before us the justice has noted on his transcript "*costs not paid.*" We are therefore clearly of the opinion that the giving of the recognizance in this case was not the equivalent of the payment of the costs and the appeal must therefore be stricken off.

Second. The second reason assigned in support of the rule to strike off the appeal it is unnecessary for us to consider.

And now, April 18, 1907, the rule to strike off appeal is made absolute and appeal stricken from the record at the cost of the appellant.

For plaintiff, *J. M. Dickson.*

For defendant, *Wm. C. Boyd* and *E. E. Crumrine.*

[From Harry Russell Myers, Esq., Washington, Pa.]

The validity of a contract by a municipal corporation to locate public buildings at a certain place, in consideration of a donation toward expenses, is denied in Edwards v. Goldsboro (N.C.) 4 L. R. A. (N. S.) 589

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PITTSBURGH, PA., MAY 15, 1907.

Court of Common Pleas No. 2,

ALLEGHENY COUNTY.

DILWORTH v. SCHUYLKILL IMPROVEMENT LAND COMPANY OF PHILADELPHIA.

Wills—Definite failure of issue—Act of July 9, 1897.

Testator devised property to his daughter with power of appointment, but in default of issue then to certain persons. Held, that under the act of July 9, 1897, the will meant a definite failure of issue and the daughter therefore did not take in fee simple.

No. 816 April Term, 1906. Case stated in assumpsit.

Opinion by SHAFER, J. Filed March 16, 1907.

This is an amicable action for the purchase money of land which the defendant refuses to pay because, it says, the plaintiff does not own the land in fee, but has only a life estate.

From the case stated it appears that the plaintiff's title is under her father's will, by which the testator devises to her the residue of his estate, of which the land in question is a part, with power to appoint among her children or their issue, if any she had, and "in default of issue of my said daughter" then to certain named persons, and if either of these should die without issue, then to the survivors. The gift to the daughter was intended to be for her sole and separate use, but it appears that she was not then married or in contemplation of marriage. The will was executed in the year 1901. It was practically admitted upon the argument of the case that if this will had been made before the passage of the act of July 9, 1897, P. L. 213, it would have given a fee to the plaintiff, the property being given to her and in default of issue of the first taker to other named persons.

The act in question provides that in a deed or will the words "die without issue," or "die without leaving issue," or "have no issue," or any other words which may import either a want or failure of issue of any person in his lifetime or at the time of his death, or an indefinite failure of his issue, shall be construed to mean a want or failure of issue in the lifetime or at the death of such person, and not indefinite failure of his issue, unless a contrary intention shall appear in the instrument.

It is contended by the defendant that this act has changed the rule of law above mentioned, under which it is admitted, if it were not for this act, the plaintiff would take a fee tail, which under the act of 1855 would be deemed a fee simple. It is claimed by the plaintiff that the act is unconstitutional and void, and that even if constitutional it does not affect the construction of the will in the present case.

The general result intended to be accomplished by the act is quite plain. Certain words and phrases in regard to failure of issue of a grantee or devisee had acquired in the law a certain meaning and effect, which was, that subject to the power of the grantor or devisor to express a different meaning, they had the legal effect of giving a fee to the first taker. This not being the meaning which one not learned in the law would usually conceive the words to have, lead to frequent failures of testators to accomplish what they really intended, and was well known in numerous cases to have frustrated the actual intention, giving a fee tail where only a life estate was intended. It seems plain that the intention of the legislature was to provide that these words and expressions which, standing by themselves, heretofore imported a fee tail, and thus a fee simple, unless the contrary was otherwise indicated in the will, should thereafter indicate a life estate, unless otherwise indicated in the will. That the legislature has power to do this we cannot doubt. It is competent for it to direct in what sense words and phrases shall be used in wills and contracts thereafter made. It is true that the act does not directly ex-

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press that the words shall mean so and so, but that they shall be "construed to mean" so and so, and this, it is argued, is an attempt to direct the courts in the exercise of a judicial function, and therefore a usurpation of judicial functions on the part of the legislature. Taken in a strictly literal sense, this might be true, but the expressions "shall be construed," "shall be deemed," etc., have been used time out of mind in statutes to import the same as "shall mean." For example, in the act of 1855 it is provided that wherever an estate tail would be created by existing laws, it "shall be taken and construed to be a fee simple." It is not intended to be an interference with the conclusions of the court as to the meaning of certain words, but a direction to those who use the words, in what sense they shall be used. The only case to which we have been referred by counsel for the plaintiff in support of their contention of the unconstitutionality of the act is that of *Titusville Iron Works* v. *Pennsylvania Oil Company*, 122 Pa. 627, in which case there was before the court an act which undertook to give to laborers a mechanics lien by direction to the courts to construe the acts already existing so as to include laborers. This was either an attempt to amend the existing laws as to mechanics liens without reciting them for amendment, as the constitution requires, or else it was a direction to the courts to overrule its former decisions in regard to the meaning of those acts, and to construe them otherwise. As a matter of course the act was void taking it either way, and the court expressly points out that such acts are void by reason of the provisions of article 3, section 6 of the constitutuion, which would not have been void as to future cases under the previous constitutions. The effect of the act in question in this case is not to change in any respect any previous statutory provision, but only a common law rule, as to the change of which no particular form is required by the constitution. We are therefore of opinion that if the meaning and effect of the act be as above stated, it is not an attempt on the part of the legislature to exercise a judicial function, but is an attempt to change a rule of the common law, which the legislature has power to do.

We have said that the intention of the act is to change the meaning of certain expressions so as to make them a definite failure of issue instead of an indefinite, in the absence of other indications to the contrary contained in the instrument, and we understood it to be admitted on the argument that such was its effect if valid, although it was suggested by plaintiff's counsel that the language of the act is self-contradictory. It must be admitted that the phraseology of the act is somewhat peculiar and in a sense ambiguous. The enactment is that words which may import either X or Y shall be construed to mean X and not Y, unless it appears by the will that they mean Y. These words may be read in such a sense that the futile result would be a direction to construe words importing X to mean X and words importing Y to mean Y. The obvious meaning, however, is that words which may import X or import Y, that is, as to which it is doubtful from the words themselves which they import, being applicable to either, shall be construed to mean the first, unless a contrary intention appears in the instrument by something besides the words themselves. The act, therefore, appears to mean that if words are used which in themselves leave it doubtful whether the failure of issue intended is definite or indefinite, they shall mean a definite failure of issue, unless something else in the instrument shows that they are not so intended. The words of the will in this case, "in default of issue of my said daughter," are in themselves applicable to a definite or to an indefinite failure of issue, and would be applied to either as the intention of the testator should appear from the will. They are, therefore, words which in the language of the act may import either a failure of issue of the daughter at her death or an indefinite failure of her issue. The rule of law prior to the act was that in the absence of any indication in the will to the contrary these words imported an indefinite failure of issue, and the effect of the act is to change that rule so that in the absence of other indications in the will the words are to mean a definite failure of issue. We are of opinion therefore that the act is directly applicable to this case.

It is also argued by plaintiff's counsel that

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even if the act be constitutional, there is enough in the will to show that an indefinite failure of issue was meant. We are unable to see anything in the will which indicates one way or the other which kind of failure was meant, except the words "in default of issue," and these, if we are right, are the very words which, standing alone, the legislature has directed shall mean a definite failure of issue. Being of the opinion, therefore, that the plaintiff is not the owner in fee simple of the land in question, it is ordered that judgment be entered for the defendant with costs.

For plaintiff, *Patterson, Sterrett & Acheson.*
For defendant, *McCleave & Wendt.*

(Common Pleas No. 2, Allegheny Co.)

CONDIFF v. ROTT et al.

Equity—Specific performance—Default by plaintiff.

A entered into a contract with the B borough for the exclusive privilege of collecing garbage, B to furnish householders with garbage cans and A to pay a certain sum to B per annum. A was in default in payments and B threatened to annul the contract. Held, on bill by A for an injunction that specific performance would not be decreed, A being in default and the contract not of such a nature that specific performance could be decreed.

No. 162 January Term, 1907.

Opinion by SHAFER, J. Filed February 27, 1907.

The bill is for an injunction to restrain the defendants from declaring the forfeiture of a certain contract made by the borough of Homestead with the plaintiff, and from awarding a like contract to any other person than the plaintiff, and to require the defendants to furnish garbage cans to the inhabitants of the borough as provided in the contract.

FINDINGS OF FACT.

1. The borough of Homestead is a borough of the county of Allegheny, incorporated under the general borough law, and in June, 1904, enacted an ordinance which was approved by the burgess, providing for the collection of garbage in the borough.

2. The provisions of this ordinance were substantially that the borough should purchase cans and furnish them to all the inhabitants of the borough occupying buildings of any description therein, on deposit of $1.00 with the borough clerk; that these cans were to be of a certain size and kind; that the cans were to be removed from the premises of the inhabitants at least once a week, the contents taken to the garbage furnace and the can returned to the household; that the charge for the removal, hauling and return of the garbage cans should not be more than a certain amount for each can, to be paid for as agreed upon between the inhabitants and the contractor; that the contracts should be let for the hauling of garbage for a term of three years, and that the borough should not license or allow any other person than the person to whom the contract was let to haul garbage or ashes along the borough streets; and that every person refusing to conform to the provisions of the ordinance should, on violation, or proof of such refusal, pay a fine to be collected by law.

3. On the first of August, 1904, an agreement was made between the plaintiff and the borough defendant, which recites the ordinance above mentioned and that the plaintiff had bid the sum of $2,550 per year, payable monthly, for the exclusive privilege of hauling garbage under the ordinance, and that that bid had been accepted. And it is thereupon agreed by the borough that the plaintiff shall have the exclusive right to haul garbage under the ordinance for three years, and that he would pay the $2,550 per year in monthly instalments at the end of each month and give a bond in the sum of $2,000, with approved sureties, for the faithful performance of his contract.

4. The borough purchased a large number of cans of the description contained in the ordinance, and placed a considerable number with various inhabitants of the borough, and the plaintiff proceeded to collect the garbage from the cans and remove the same to the garbage furnace. Some time after work was begun by the plaintiff under the contract, he began to be in default from month to month in the payment of the sum agreed by him to be paid

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to the borough, of which default complaint was made to him from time to time by the borough. On the part of the plaintiff, complaint was made against the borough that it had not required all the householders of the borough to take and use the garbage cans as provided in the ordinance, and further that other persons were permitted by the borough to haul garbage therein.

5. On May 4, 1906, the plaintiff was in arrears in the sum of $1,233, and it was agreed between the plaintiff and the defendant borough that the plaintiff should be exonerated from $500 of the sum then due on his written contract and that he should pay $300 a month for two months and $312 each month thereafter, including his regular monthly payments, until the whole should be paid up.

6. At the date of filing the bill the plaintiff's debt to the borough had increased to $911, and at the time of filing the answer, December 1, 1906, had increased to $1,236.

7. On October 6, 1906, the councils gave to the plaintiff a notice in writing that unless he paid up all money due on the garbage contract in ten days they would take the contract from him.

8. From time to time other persons have hauled garbage or refuse from the borough to the garbage furnace, and one or more persons were prosecuted therefor by the borough officials under the ordinance.

9. A canvas of the borough made by the plaintiff showed that there are about 3,600 families or householders in the borough, and that less than 1,000 of these have garbage cans as required by the ordinance. No householder has been prosecuted under the ordinance for not possessing and using a garbage can.

CONCLUSIONS OF LAW.

1. The bill is substantially for the specific performance of the contract between the parties. We are of opinion that such performance can not be decreed, for the reason that the plaintiff is himself greatly in default, and for the further reason that the contract on the part of defendant is too indefinite to allow of the granting of such relief. It is elementary law that he who seeks specific performance must show that he has himself performed or offered to perform his own part of the contract.

2. To completely carry out the contract on the part of the borough it would be necessary to require the borough to compel all the householders in the borough to take and use garbage cans, paying for each of them to the borough. It is obvious that the borough has no machinery at its disposal which could bring about this result. To require the borough to prevent any other person than the plaintiff from collecting garbage is also to require them to do that which they cannot do directly but which could only be done by the prosecution of persons infringing the ordinance.

We are therefore of opinion that the bill should be dismissed at the cost of the plaintiff without prejudice, however, to the right of either party to pursue their remedies against the other at law.

Let a decree be drawn accordingly.

For plaintiff, *A. C. Johnston* and *R. P. Tannehill.*

For defendant, *P. H. McGuire.*

(Common Pleas No. 2, Allegheny Co.)

WALKER PLACE LAND CO. v. WALL.

Lots—Building line—Agreement.

Where defendant purchases a lot in ignorance of a previous agreement of his grantor to establish a building line and expends large sums in erection he will not be held bound by the agreement of his predecessor.

No. 22 January Term, 1907.

Opinion by FRAZER, P. J. Filed February 18, 1907.

The purpose of this bill was to restrain defendants from erecting a building upon a lot of ground, fronting on California avenue in the city of Allegheny, in front of a line twenty-five feet from the line of the street and running parallel therewith. From the bill, answers and proofs we find the following facts:

FINDINGS OF FACT.

1. The Walker Place Land Company is a corporation organized for the purpose of buying and selling real estate, and as such became the owner of two tracts of land in the Eleventh ward of the city of Allegheny,

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which it laid out in a plan consisting of 114 lots, which plan is recorded in plan book Vol. 21, pages 38 and 39.

2. By an agreement in writing dated March 21, 1906, plaintiff agreed to convey to James P. Wall, one of the defendants, lot No. 114 in plaintiff's plan for the sum of $500, the agreement containing the following clause: "And as a further consideration, and in consideration of the reduced price at which the above described lot is sold, he, the party of the second part, agrees to purchase at his own expense the two old frame houses on the land now adjoining the lot herein described and facing on California avenue, and to commence within one year to tear the same down and clear up the lot and fill in the lot and establish a building line along the California avenue front from Young's land south to the southerly line of the property now owned by P. Wall, the same distance back from the street as the Young houses are now erected at California avenue and Termon avenue, this line to apply to the Wall property on both the northerly and southerly side of Verner avenue."

3. Subsequently on April 6, 1906, plaintiff executed and delivered to James P. Wall individually a deed of general warranty for lot No. 114 above referred to, which deed is recorded in deed book Vol. 1474, page 418, and contains no exceptions or reservations whatever, nor does it contain the clause in reference to a building line, contained in the agreement of March 21, 1906, and quoted in the preceding paragraph, nor any reference whatever to that agreement.

4. The lot referred to in the agreement of March 21, 1906, as the lot upon which "the two old frame houses" are located, was at that time owned by Nancy Patterson, who, on May 31, 1906, by deed of that date, recorded in deed book Vol. 1473, page 271, conveyed the same to Patrick Wall, one of the defendants, that lot having a front of 43.5 feet on California avenue and a depth of 50 feet. The defendant, Patrick Wall, is the owner of the property adjoining on the south, the lot purchased from Mrs. Patterson, and also lot No. 114, which James P. Wall purchased from plaintiff.

5. On August 17, 1906, James P. Wall conveyed lot No. 114 in plaintiff's plan to his father, his co-defendant, Patrick Wall, for the consideration of $550. At the time of the conveyance and previous thereto, Patrick Wall was not informed of the agreement of March 21, 1906, and had no knowledge of its existence or of its contents, and especially was not advised of the clause in relation to the building line referred to in paragraph two above until some time in the month of September, which was after he had begun work on his apartment house, nor was he interested with his son in the purchase of the lot.

6. It appears from the testimony that some time during the early spring of 1906 George T. McDonald, sales agent for plaintiff, and Patrick Wall and others owning property in that neighborhood, consulted together with a view to the purchase by Patrick Wall of lot No. 114 in plaintiff's plan and also the property of Mrs. Patterson with a view to removing the old houses located on the Patterson lot, and also of establishing a building line on the Patterson and Wall properties, a purchase under these negotiations being contingent upon contributions toward the purchase money being made by other property holders in that neighborhood. Offers to contribute not amounting to a sufficient sum in the opinion of Patrick Wall to justify him in improving the property in accordance with the plan discussed, negotiations were terminated.

7. Since the purchase by Patrick Wall of the Patterson lot and lot No. 114, he has begun the erection of an apartment house on the property, and has already expended thereon about $10,000. The front line of the house is on a line parallel with the front or outer line of the porch of the Young house, and not parallel with the line of the front wall of the Young house, the front of the apartment house being 19 feet six inches from the line of the street, instead of 31 feet 6 inches, as is the front wall of the Young house.

8. In the plan of lots laid out by plaintiff, where the same fronts on California avenue, there is established a building line thirty feet west from the street line, and on the side streets there is a building line of twenty feet from the street line. There is,

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however, no building line established on the property fronting on California avenue between Termon avenue and Verner avenue, which includes the Young property, the Patterson property, lot No. 114 in plaintiff's plan, and other property owned by Patrick Wall.

CONCLUSIONS OF LAW.

1. The findings of fact show that James P. Wall purchased lot No. 114 in plaintiff's plan individually and with his own money. They also show that his co-defendant, Patrick Wall, had no knowledge of the agreement of March 21, 1906, nor of its terms until after he had purchased from James P. Wall and had begun the erection of his apartment house on the lot. Under these circumstances plaintiff is not entitled to an injunction and the bill must be dismissed.

Let a decree be drawn accordingly.

For plaintiff, *Andrew H. Mercer.*

For defendant, *J. S. & E. G. Ferguson.*

Court of Common Pleas,

WASHINGTON COUNTY.

BEGGS v. BEGGS.

Divorce—Act of March 13, 1815, Sm. L. 286.

A presented a libel in divorce asking that a decree be made divorcing her husband from bed and board and asking for alimony on the grounds of desertion, which libel was afterwards amended asking for an absolute divorce from the bonds of matrimony. Respondent was not served personally. Decree refused as there were no facts proved to show an intention wilfully and maliciously to break off marital co-habitation permanently.

No. 143 November Term, 1905. Libel in divorce on ground of desertion.

Opinion by TAYLOR, J. Filed April 17, 1907.

This cause came on to be heard on amended libel and testimony taken before the commissioner and was submitted without argument and upon consideration of the whole case, including the libel originally filed for a divorce from bed and board and the answer of respondent to rule for alimony, etc., the divorce prayed for in the amended libel is refused for the reason that on the whole case there is not shown such wilfull and malicious desertion as is required by the act of March 13, 1815, 6 Sm. Laws 286, and the decisions of our courts, that at the time of the alleged desertion persisted in there must be facts evincive of an intention wilfully and maliciously to break off marital cohabitation permanently, without which the court must refuse the divorce prayed for.

When counsel for libellant presented to the court the amended libel asking to change the divorce proceeding from bed and board and alimony to absolute divorce from bonds of matrimony, he stated that respondent had arranged the matter of alimony with the libellant, we are strengthened in the belief that the libel as amended is not free from collusion between the parties, nor is the amended libel properly sworn to or is there service shown upon the respondent. Acceptance of service by counsel is insufficient.

But on the other question of the evidence being insufficient to show wilfull and malicious desertion persisted in for the statutory period, there are a number of well considered lower court decisions on this point in our state which are well worthy of notice and citation here.

Williams v. *Williams*, 1 Woodward 308, Woodward, J.; *Jayne* v. *Jayne*, 4 Kulp 74, Rice, J.; *Detrick* v. *Detrick*, 6 Kulp 164, Rice, J.; *Gearing* v. *Gearing*, 1 Dist. Rept. 418, White, J.; *Hassett* v. *Hassett*, 18 Pa. C. C. R. 269, Noyes, J.

The evidence required in divorce for desertion under the act of 1815 is entirely different from that to bar dower or curtesy rights under the act of May 4, 1855, P. L. 430, for desertion, as shown by the decisions in *Weller* v. *Weller*, 213 Pa. 265, and *Bealor* v. *Hahn*, 117 Pa. 169, and 132 Pa. 242, actions of ejection, wherein it is stated in the former that "when the facts show a desertion, it is presumed to be wilfull and malicious, and the burden is on the husband to show reasonable and lawful cause for it."

And now, April 17, 1907, the divorce prayed for in the amended libel is refused and libel as amended dismissed at the cost of the libellant.

For libellant, *Irwin & Morgan.*

For respondent, *T. F. Birch.*

[From Harry Russell Myers, Esq., Washington, Pa.]

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PITTSBURGH, PA., MAY 22, 1907.

Orphans' Court,

ALLEGHENY COUNTY.

In re Estate of DAVID G. ELLIOTT, Deceased.

Estates — Executors — Stocks — Depreciation — Surcharge.

Where the executors of an estate are justified in believing that the interests of five-sixths of the distributees desire certain stocks which came into the hands of the executors from the testator, to be distributed to them in kind at the audit, unless an advancing market warranted a sale, they should not be surcharged for an unforseen depreciation in the market prices accruing shortly after the stock was received by them.

Although a distributee who is a minor could not agree to accept the stock in kind, if it appears in addition to the above facts, that the stocks were dividend paying and were purchased by the testator: that their sale was not necessary for the payments of the debts and the depreciation took place within the year after testator's decease, it cannot be held that the failure to sell when the market price fell showed a want of ordinarily prudent business judgment.

No. 74 March Term, 1907. Sur-exceptions to account.

MILLER, J.

STATEMENT.

The main question is, whether the accountants should be surcharged for the loss between the appraised value of stocks and the amount realized from the sale thereof, on account of their alleged negligence and mismanagement.

The testator died February 27, 1905. The devisees are his widow to the extent of one-third of his estate, and to each of his four children one-sixth of the remainder; of the latter, a son, George L. Elliott, is a minor, for whom W. W. Lewis was appointed guardian on March 31, 1906. Mrs. Elliott is the testator's second wife and George is their son; the other three are children of the testator's first wife. The guardian and Mrs. Elliott are brother and sister.

At No. 99 June Term, 1906, the executors filed a first and final account, including in the balance for distribution, cash $28,406.56; 100 shares of Westinghouse Electric and Manufacturing second preferred stock, appraised at $90½ per share; 100 shares of the same first preferred, appraised at $95 per share; 200 shares of National Fireproofing, common stock, appraised at $11 per share, and 300 shares of National Fireproofing, preferred, appraised at $34⅞ per share.

They submitted at the audit an agreement executed April 4, 1906, by all of the distributees, stipulating that distribution in kind should be made to them of the foregoing stocks.

The guardian and widow declined to be bound by said agreement, stating that they had given notice within a few days after its execution of their repudiation of the same. To the account then filed they filed exceptions, only, as to the commissions charged by the executors upon the unsold stocks. Thereupon, a decree was entered distributing only the cash on hand and eliminating the commissions on the unsold stocks.

At No. 163 November Term, 1906, the widow and guardian presented their petition alleging that the foregoing stocks were still in the hands of the accountant and praying for account thereof. Upon consideration of the petition and answer, and after testimony taken, the executors were directed to deliver to those of the distributees so electing, one-half of said stocks; to sell the remainder and account therefor; the distributees so electing to give security conditioned upon the payment by them of their pro-rata share of any unpaid debts, costs and expenses of further administration.

The dispute in the present account arises over the proceeds of the sale of the remainder of said stocks on which there has been considerable loss as compared with the appraised value; the exceptions filed by the guardian and widow demand a surcharge for this loss; also a surcharge of the accountant's commission of five per cent and the fees of accountant's attorneys.

For a few months after testator's death

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until July, 1905, firepoofing preferred stock sold above the appraised value; then it suddenly dropped below 30; some sales were as low as 21 in November, 1905, since that time the average price has not been much above 25. It is accounted for at 26.

Fireproofing, common, sold above appraisement after testator's death, until in August, 1905, when it dropped to 5; since that time the prices have run from 6 to and 8 dollars per share. This stock is accounted for at $6 per share.

The first preferred Westinghouse Electric stock was quoted above appraisement until November, 1905, when it dropped to 85, and is accounted for at that price.

The Westinghouse Electric, second preferred, also was quoted above appraised price until April, 1905; after which time it began to decline, being sold as low as 74¼ in September, 1906. It is accounted for at 77.

All the foregoing sales were made in pursuance to an order of this court in January of 1907.

The weight of the evidence establishes the fact that the widow knew of the family desire to hold these stocks and impliedly acquiesced therein, at least from November, 1905, down to and after the time when she and the guardian signed the agreement of April, 1906.

One of the executors—testator's son—during all this period has held and still holds in his own right a number of these same stocks.

On other stocks sold by the executors and accounted for in the first account, they realized for the estate an advance over the appraisement in excess of the loss on these particular stocks.

OPINION. Filed April 27, 1907.

It is manifest that the executors believed and were justified in believing that the interests of five-sixths of the distributees, which included the widow, desired these stocks to be held and distributed to them in kind at the audit unless an advancing market warranted a sale. This of itself is sufficient to exempt them from exception so far as the widow is concerned.

A different question presents itself as to the minor's interest. He could not agree to accept these stocks in kind, even though it appears that he did sign the agreement, nor was their anyone to speak for him until his guardian was appointed. This was a year after testators death and after the loss had occurred.

It is manifest that the guardian did consent for a while to accept these stocks; and that he was not very certain as to his course of action appears from the fact that the exceptions filed by him to the first account relate solely to the executors commission and not to a failure on their part to sell the stocks.

They, however, are neither protected nor injured by the guardian's temporary joinder in the agreement; if they mismanaged the trust and were grossly negligent, they are liable.

These were dividend paying stocks. The testator himself had invested in them; the sale thereof was not necessary for the payment of debts; the executors had a year in which to convert them into cash; no exact time can be fixed during that period when the executor shall sell; he must be governed by the circumstances of the case.

The drop in the market seems to have been sudden with relation to all these stocks. It began almost immediately after the estate came into their hands. They then believed and continued to believe that it was unnecessary to sacrifice the stocks by accepting the lower price, and that in time they would attain their former values.

Undoubtedly from the present view it would have been far wiser if the stocks had been sold; while their judgment in holding them now seems to be mistaken, yet as in *Stewart's Appeal*, 110 Pa. 410, so here, it appears they exercised the ordinary judgment of prudent men in holding on to these stocks; one of their own doing with the trust estate what he did with his own. In the exercise of their discretion, their refusal to sell after the market began to decline, during the early portion of the first year of their administration does not warrant a decree against them for liability by reason of the loss which has occurred.

It appears that the executors charged 3 per cent commission on the stocks they delivered in pursuance of the order of this

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court to those in interest who elected to take; they will be allowed the same rate in this account; the exception relating to fees for counsel are dismissed, the circumstances required the employment of counsel, and for all the services rendered the amount charged is not excessive.

For accountant, *A. M. Imbrie.*
For exceptants, *J. S. Ferguson.*

(Orphans' Court, Allegheny Co.)

In re Estate of G. A. BOEHRIG, Deceased.

Preferential legacies.

A legacy of "one thousand dollars deposited or made available by an Life Insurance Police," is specific.

No. 34 April Term, 1907.

HAWKINS, P. J.

STATEMENT.

It is claimed in this case that the first stated, is to be preferred to the second, of the following legacies:

"(a) To my only daughter Alma $1,200 twelve hundred dollars for studying and equipping purposes.

"(b) To my brother Ernest Boehrig or his heirs (Port Secretary, Muellhausen, Thuringen, Peov. Sachsen, Germany) $1,000—one thousand dollars, deposited or made available by an Life Insurance Police with the Germania Life Insurance Co., of New York, State of N. Y."

Alma is a minor and lives with her mother who was made residuary legatee of the personal estate.

The balance for distribution is $554, consisting of balance of proceeds of above mentioned policy. It does not appear that there is any other estate.

Preference is claimed for the daughter because her legacy is for maintenance or education.

OPINION. Filed May 2, 1907.

The application of the rule invoked by claimant is to legacies of the same grade. The preference is an exception to the general rule that equality is equity and is given to a legacy over its fellows because of the existence of a consideration: *Duncan* v. *Alt*, 3 P. & W. 382. The gift of a pecuniary legacy expressed to be for the maintenance of testator's minor child will give it a preference over other pecuniary legacies: *Bixenstein's Estate*, 6 D. R. 19; but the implication upon which this preference rests has obviously no application to a specific legacy which belongs to a higher grade. The question here turns therefore on the character of the legacies given. That to testator's minor child is admittedly general; but that to his brother has a different stamp. The gift is in the first instance pecuniary, but the context shows that a particular fund was intended as the subject of gift—"one thousand dollars deposited or made available by an Life Insurance Police." If the legacy had been made payable "out of" this fund its classification would have been different; but the proceeds of the policy are stamped as the exclusive source of the gift. The whole of the fund—the thing itself—is given. "When the legacy is so connected with the fund out of which it is payable," said the the court in *Smith's Appeal*, 103 Pa. 559, "that the legacy and the fund are the same, it is specific; as if I bequeath to B. the money now owing to me from it, or in the hands of A. or the money due to me on the bond of A." So here the gift is of a specific fund, "deposited or made available" by the policy of the German Insurance Company. The gift and the funds are inseparably connected.

The result of this construction is to give the fund to testator's brother rather than to his child; but he must be presumed to have meant what was written. He might have ignored his daughter altogether and this court have been powerless to help her: *Bixenstein's Estate, supra.* So his mistake in the amount of his estate is remediless.

For accountants, *Grote & Grote.*
For exceptants, *Wm. M. Benham.*

Court of Common Pleas,

WASHINGTON COUNTY.

WOODS v. U. S. NOVELTY COMPANY et al.

Equity—Corporations—Act of 1874 as amended by act of 1876—Subscriptions on capital stock—Liability of stockholders.

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A corporation was formed under the laws of the Commonwealth of Pennsylvania and charter issued. The certificate did not set out that certain stockholders were to get shares of paid-up stock in lieu of a patent to be turned over to the corporation necessary for its business, but set out that 10 per cent of the capital stock subscribed was paid in cash. Held, that these stockholders were not liable for debts of the insolvent corporation and the act of 1874, as amended by act of 1876, did not apply if sale of the patent was bona fide.

The stockholders being also the directors without formal meeting contracted an indebtedness which was paid by their individual notes.

Held, that these stockholders should be allowed a credit of their proportion paid on this indebtedness as an off-set to balance due on their unpaid subscriptions.

No. 1642 in equity. Adjudication.

Opinion PER CURIAM. Filed April 26, 1907.

The court finds the facts in this case to be:

1. Some time in the year 1904 a paper of which the following is a copy was executed by the persons whose names are thereto attached.

"We the undersigned subscribe for the number of shares of stock set opposite our names in a proposed corporation, to be known as the U. S. Novelty Company, with its principal office in Washington, Pa.; said shares of stock to be $50 each and the total number thereof to be two hundred; the total capitalization of the company being $10,000. We further agree to pay for said stock whenever the directors of said proposed corporation shall call for the same:

Name.	No. of shares.
Samuel Siegel	25 paid.
O. V. Hootman	25 paid.
C. L. Sanford	100 paid.
W. B. Brush	25 paid.
Boyd E. Warne	20 paid.
William B. Ritchie	5 paid."

2. On the 29th day of December, 1904, a charter was issued from the State Department at Harrisburg to the U. S. Novelty Company, its capital stock being $10,000 divided into 200 shares of the par value of $50, and $1,000 thereof having been paid in cash to the treasurer of the corporation. The fifth paragraph of the charter is in these words:

"Fifth. The names and residences of the subscribers and the number of shares subscribed by each are as follows:

Name.	Residence.	No. of shares.
Samuel Siegel	Washington	25
O. V. Hootman	"	25
C. L. Sanford	"	75
W. L. Duvall	"	25
W. B. Brush	"	25
Boyd E. Warne	"	20
Wm. B. Ritchie	"	5"

3. On the 23rd day of December, 1904, C. L. Sanford, who on the records of the office of the U. S. Patent Department was the owner of a patent for "an improvement in Shade Roller Hangers and Adjusters" for and in consideration of five thousand dollars, assigned said patent to the U. S. Novelty Company and on the 9th day of January, 1905, the U. S. Novelty Company had said assignment recorded in Liber H. 71, page 63 of transfers of patents in the Patent Office at Washington, D. C.

4. Before this patent was assigned the owner had asked eighty-five hundred dollars for it, but when it was assigned it was intended that the assignment should pay for the 100 shares of stock which C. L. Sanford had agreed to take as shown by the paper, a copy of which is set out in the first finding of this adjudication.

5. After C. L. Sanford had subscribed for 100 shares of stock and before the charter had been applied for, C. L. Sanford verbally sold to W. L. Duvall a one-fourth interest in his patent and had received from Duvall the consideration therefor, so that when the patent was assigned to the U. S. Novelty Company in equity one-fourth of it belonged to W. L. Duvall and he was entitled to one-fourth of the 100 shares of stock which it paid for in full. This being so, when the papers for the charter were prepared C. L. Sanford was given 75 shares and W. L. Duvall 25 shares.

6. The $1,000 in cash paid to the treasury was twenty per cent on the 100 shares owned and paid for as follows:

Samuel Siegel on 25 shares owned by him paid $250
O. V. Hootman on 25 shares owned by him paid $250
W. B. Ritchie on 25 shares owned by him paid $250
Boyd E. Warne on 20 shares owned by him paid $200
Wm. B. Ritchie on 5 shares owned by him paid $50

7. On or about February 20, 1905, some

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members of the company spoke to C. L. Sanford about the fact that he had named $8,500 as the price which he would let the company have his patent for and as the stock that he and Duvall received (100 shares in all) was only worth at par $5,000, that left due him $3,500. He thereupon gave to the company his receipt for $3,500 to show that he had no further claim on account of the patent. At the time he gave this receipt to the company he received no money from anyone and expected none. It was given in view of the previous talk in regard to the price he would charge for his patent and to donate to the company or the other members of it the $3,500. And to show that if the patent was put in at $8,500 as first talked of rather than at $5,000 as set out in the written assignment, it had been fully paid for.

8. U. S. Novelty Company borrowed from the Washington Trust Company two thousand dollars. Samuel Siegel, W. B. Brush, W. B. Ritchie and Boyd E. Warne, four of the defendants, with the other directors were sureties or endorsers on the notes. When this indebtedness became due it was agreed that in place of paying an assessment on their stock into the company treasury and then out of the treasury to the bank, they would pay direct to the bank on the company's indebtedness and the payments thus made by them were to be credited on their stock.

9. The U. S. Novelty Company is insolvent.

CONCLUSIONS OF LAW.

1. That the stock owned by C. L. Sanford (75 shares) is fully paid up.

2. That the stock owned by W. L. Duvall (25 shares) is fully paid up.

3. That Samuel Siegel is a stockholder owning twenty-five shares, on which there has been paid in cash $250 and that he owes the company on his stock $1,000, less the amount he paid on the company's indebtedness to the Washington Trust Company.

4. That W. B. Brush is a stockholder owning twenty-five shares, on which there had been paid in cash $250 and that he owes the company on his stock $1,000, less what he may have paid on the company's indebtedness to the Washington Trust Company.

5. That Boyd E. Warne is a stockholder and owns twenty shares of stock, on which he has paid in cash $200 and that he owes the company on said stock $800, less what he may have paid on the company's indebtedness to the Washington Trust Company.

5. That W. B. Ritchie is a stockholder and owns five shares of stock, on which he has paid $50 and on which he owes $200, less what he may have paid on the company's indebtedness to the Washington Trust Company.

7. That O. V. Hootman is a stockholder and owns twenty-five shares on which he has paid $250 and on which he owes the company the sum of one thousand dollars.

8. That the receipt for $3,500 given by C. L. Sanford on February 20, 1905, to the company or no part of it is a credit on the stock held by Samuel Siegel, W. B. Brush, Boyd E. Warne, W. B. Ritchie, and O. V. Hootman, respectively, and that neither of them is entitled to any credit on their stock on account of the patent assigned by C. L. Sanford to the company as against the plaintiff in this proceeding.

COMMENTS.

It will be noticed by reference to page 2 of the company's minutes, that the stockholders of this company were all directors. For this reason we have concluded that the defendants should have credit on their stock for the payment they made on the company's indebtedness to the Washington Trust Company. They are clearly entitled either to this credit on their stock or to present their claims for these payments as creditors. Of course, strict formality would have required these defendants as directors to have met and called upon themselves by a resolution for payment on their stock in sums sufficient to pay the notes. Then as stockholders they could have paid the money to the treasurer and he could have paid it to the Trust Company. But the company's business was not done in that formal way and although the proof is rather meager yet we hold there is sufficient to show that there was an agreement between the defendants as directors and as stockholders acting in a dual capacity that the payments that they should make on the notes in bank should be a credit on their stock.

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These payments clearly could not be used by the defendants as a "set off" under the defalcation act to the receiver's claim against them. And it is not on that ground that we allow them. It is on the ground that at the time the payments were made by the defendants it was agreed that these payments should be credits on their stock and that in legal effect what was done was the same as if they had then actually paid the money to the treasurer (one of their number) by direction of the directors (themselves) as a credit on their stock and to raise money to pay the notes and he had then paid the money to the bank. The money was actually paid, and this coupled with the then present intent, made it a payment on the stock.

As to the $3,500 receipt given by C. L. Sanford to the company on February 20, 1905, we are clearly of the opinion that as against the creditors of the company there could be no credit given on the defendant's stock. As between C. L. Sandford and the other stockholders the agreement may be binding, and if the company was solvent and this was a proceeding to wind up the affairs of the company and make distribution between the stockholders, it would have to be taken into consideration. The transaction in effect was, as the witness, Brush, termed it, a gift by Mr. Sanford of a claim he had as a credit against the company, or in other words, Sanford agreed so far as *he and his claim of $3,500* was concerned it could be considered that the *other stockholders* had paid into the treasury the sum of $3,500 and that then it had been paid to him and he had given a receipt for it. *But nothing was paid.* And the liability of the stockholders to the present or future creditors of the company, *not consenting thereto*, to the extent of the whole face value of their stock, remain unaffected by this transaction. By actual payment in cash or in property which would be assets of the company is the only way stockholders can discharge their corporate liability to the general creditors of a corporation. There is no claim that the stockholders who are making the claim for this $3,500 credit ever had any interest in the patent as W. L. Duvall had and that they thus paid part of the price of their stock when C. L. Sanford assigned the patent to the company. The $3,500 was a debt owing by the company to C. L. Sanford and for the benefit of the other stockholders he receipted for the debt without receiving a cent from either company or the other stockholders. Such a transaction would only bind those who were parties to it.

In our opinion the act of 1874, as amended by the act of 1876, does not apply to this case. The purpose of the section of the act of 1874, as amended by the act of 1876, which was cited by counsel, was to modify another section of the act which required ten per cent of the face value of all the capital stock to be paid to the treasurer before a charter would be issued. As this ten per cent was paid in the case of the company we are now considering, the fact that nothing was said in the charter about the Sanford patent is of no consequence. The company had a right to buy this patent or anything else it needed in its business and pay for it in money or stock at its full face value independent of the provisions of the act of 1874 (amended by act of 1876) cited by counsel. The only claim on which it could be attacked by the receiver or others interested as creditors would be that the sale was not bona fide, that the thing provided was not necessary to the business of the corporation or that it was not worth what was paid for it as an asset of the company when it was bought.

And now, April 26, 1907, it is ordered, adjudged and decreed that this adjudication be filed sec. reg. And if no exceptions be filed that a decree be prepared ordering, adjudging and decreeing that the defendants, Samuel Siegel, W. B. Brush, O. V. Hootman, Boyd E. Warne and W. B. Ritchie severally account to F. H. Woods, the receiver of the U. S. Novelty Company, the plaintiff in this suit, for what they respectively owe the said company on their stock, as set out in the foregoing adjudication, and in case the exact amount that each of the said defendants owes the company cannot be agreed upon, then that a further hearing be had before the court on a day to be fixed by court to determine the exact amount each of said defendants now owe the company, or to appoint an assessor as the exigencies of the case may require.

For plaintiff, *H. R. Myers.*

For defendant, *Albert E. Sprowls.*

[From Harry Russell Myers, Esq., Washington, Pa.]

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Pittsburgh Legal Journal

ESTABLISHED 1853.

EDWARD B. VAILL, THOMAS EWING, } EDITORS

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PITTSBURGH, PA., MAY 29, 1907.

Court of Common Pleas No. 2,

ALLEGHENY COUNTY.

FROEHLICH v. VELTE FOUNDRY & MACHINE CO. et al.

Corporations—Salaries—Questioned by stockholders—Dividends—Net earnings—Powers of court in equity.

The plaintiff in a bill in equity who has voted as a director for an increase in the president's salary has no standing to later call that act into question as a stockholder.

While a court of equity has undoubted power to compel a corporation to declare dividends from its net earnings such action will not be taken unless it clearly appears that the directors have abused their discretionary powers.

No. 921 July Term, 1906. In equity.

Opinion by MILLER, J., specially presiding. Filed February 16, 1907.

The plaintiff in his own right as a stockholder in the defendant company avers in his bill that William Velte, the president of the Velte Foundry & Machine Company, dominates the affairs of the said company to the injury of himself and the minority stockholders; that the majority of the stock is held by Velte and members of his family, to whom excessive salaries are paid as officers of said company; that he has used the property and the services of employes of the corporation for his own personal profit; that the funds of the corporation have been used to pay premiums on life insurance issued on the president's life; that the affairs of the corporation are mismanaged, the officers guilty of fraud, as a result of which the plaintiff has not received dividends; praying that the salaries of the officers shall be reduced; that the president and officers of the corporation shall account; that settlement shall be made, and that dividends shall be declared. The answer admits the incorporation and holdings of stock as described in the bill, but denies the rest of plaintiff's averments.

FINDINGS OF FACT.

1. The Velte Foundry & Machine Company is a corporation existing under the laws of Pennsylvania; its purpose is the manufacture of iron, steel, or both, etc., as provided under the act of April 29, 1874. Letters patent were granted on the 30th of April, 1900. The capital stock is fixed at $60,000, divided into six hundred shares of the par value of $100 each. The plaintiff is the owner of 80 shares; the defendant, Wm. Velte, of 370 shares; other members of his family of 78 shares; the remaining shares are owned by Thomas Kirkpatrick, W. J. Froehlich, A. E. Linn, John A. Hood and Athalia White.

2. The plaintiff was employed as secretary and treasurer of the corporation, and was also a director, receiving at first a salary of $1,200 per year, while the president's salary was $2,500 per year. At the meeting of February 10, 1902, the board of directors increased the salary of the president to $5,531, and that of the plaintiff as secretary and treasurer to $1,900. The plaintiff ceased employment with the company in May, 1903. At the meeting of the board of directors of September 5, 1903, the president's salary was reduced to $5,200, and that of the secretary and treasurer to $1,200; the latter office is filled by the daughter of the president, who spends part of her time at school, but who has general charge of the business affairs of the corporation; she is assisted by a clerk to whom is paid a salary of $50 per month.

3. The president, Wm. Velte, at various times has had work done for himself personally by employes of the corporation, and has obtained small amounts of lumber and other material from the corporation for his own purpose. The value thereof is not definitely ascertained, but is much less than the sum of $500, which the president has repaid the company in full reimbursement therefor.

4. On November 1, 1903, the board of

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directors adopted a resolution reciting that the corporation was in need of money to meet obligations, for which purpose notes should be negotiated, the same to be endorsed by the president, and that in order to protect the corporation and the endorser life insurance policies should be taken out on the life of the president, the same to be for the benefit of the corporation.

5. At that time the president, Velte, was endorser of various notes, made by or given to the corporation. Two life insurance policies of $5,000 each were taken out, and were by him assigned to the corporation; they are in that condition now. The president continues as endorser on obligations of the corporation to an amount equal to the face of these policies. The total amount of premiums paid by the corporation on account of these insurance policies is about two thousand dollars.

6. To the extent that dividends have been paid, all the stockholders have been treated equally. There is not sufficient evidence to show that the item of undivided surplus in the statement marked as an exhibit is available for dividend purposes without impairing the credit and interfering with the operation of the corporation, there is not sufficient evidence upon which to base a finding of fact that the affairs of the company have been fraudulently or negligently managed by the present officers.

7. The plaintiff had a full examination of the books and affairs of the company made by auditors or experts selected by him. Neither this report, nor testimony thereon, was offered to show fraudulent conduct on the part of these defendants, or a condition of affairs justifying equitable intervention.

CONCLUSIONS OF LAW.

1. The plaintiff, as one of the directors, was a party to the resolution increasing his own and the president's salary; he has now therefore no standing to call that act into question.

2. As an obligation of the company could only be made, and its credit maintained, by the personal endorsement of the president of its paper, it had the right to secure him and to secure itself in the event of his death by carrying for its protection policies of insurance on his life, and by paying the premiums thereon so long as he continued to be personally liable, or extended his personal credit for the benefit of the corporation. When this liability ceases and the policies are re-assigned to him, he should repay the premiums paid by the company.

3. While there is no authority for, or justification of, the use by the president of the services of the corporation's employes for his personal benefit, nor of any of its property, in view of the fact that the full value thereof has been repaid, there is now no ground for equitable relief on that account.

4. The allegations in the bill, which is filed by the plaintiff in his own behalf, and the testimony in support thereof, indicates that the proper action, if any, to remedy the wrongs complained of, must be by the corporation against the president and the other officers. In the absence of an averment by the plaintiff that he made demand upon the corporation to bring suit and that it refused, he cannot in his own name maintain this suit: *Holden* v. *The Railroad Company*, 138 Pa. 111.

5. While a court of equity has undoubted jurisdiction to compel a corporation to declare dividends from its net earnings, where it clearly appears the directors have abused the discretion vested in them relating thereto under the pleadings and evidence in this case, such a decree would be unwarranted.

6. As there is not sufficient evidence to sustain the allegations of fraud, or mismanagement, nor such a condition of affairs as to require an accounting, nor to justify the conclusion that there is a surplus on hand from which dividends should be declared, and as the plaintiff brought this action in his own behalf and not for the benefit of others, equitable interference is not warranted.

The bill will be dismissed at plaintiff's cost.

For plaintiff, *Hosack, Knox & Hosack.*
For defendant, *McKee, Mitchell & Patterson.*

The right to a mandamus to compel the governor to perform a merely ministerial duty is sustained in State ex rel. Irvine v. Brooks (Wyo.), 6 L.R.A. (N.S.) 750.

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(Common Pleas No. 2, Allegheny Co.)

REIDENBACH et al. v. BURGESS AND TOWN COUNCIL OF BEN AVON.

Boroughs—Power over streets—Removal of trees.

Under its general powers over streets a borough may by ordinance require the removal of trees planted on the street which interfere with or destroy the sewers.

No. 852 July Term, 1906.

Opinion by YOUNG, J. Filed March 8, 1907.

The bill is to restrain the defendant borough from removing certain trees on some of the avenues of the borough.

FINDINGS OF FACT.

1. All the plaintiffs reside upon and all of them except Ira E. Reidenbach and W. W. Rathbun are the owners of real estate upon Laurel, Watt and Monitor avenues in the borough of Ben Avon.

2. Laurel, Watt and Monitor avenues are resident streets, Laurel being 480 feet, Watt 725 feet and Monitor 600 feet in length, and Laurel having 12 dwelling houses, Watt 15 dwelling houses and Monitor 26 dwelling houses, fronting upon them respectively.

3. The owners of the lots on these avenues and their predecessors in title have planted between the curb-line and the building line shade and ornamental trees of the elm, maple, horse-chestnut, pin-oak and North Carolina poplar varieties, without objection of the borough or its officers, and these trees have added to the beauty of the street, the comfort of the residents and the value of the property.

4. The borough of Ben Avon by ordidance No. 157, passed February 5, 1903, provided for the planting of elm, maple, horse-chestnut and pin-oak trees on the streets of the borough one foot from the side line of said streets, and provided for the payment of a premium to the person planting such trees.

5. The borough of Ben Avon by its ordinance No. 197, passed March 15, 1906, provided as follows:

"An ordinance directing the removal of all North Carolina poplar trees from the streets of the borough and prohibiting the plainting of trees on the streets of the borough after April 1, 1906, and providing penalties for the violation of this ordinance.

"Sec 1. Whereas the public sewers of the borough at several points have been damaged, broken, stopped up and injured by the roots of North Carolina poplar tress, which penetrated the sewers, and

"Whereas, it has cost the borough large sums of money to repair the public sewers and it will still cost the borough more money to put the public sewers in repair on account of the damage done to them by the roots of said trees,

"Therefore, Be it enacted and ordained by the town council of the borough of Ben Avon in council assembled, and it is hereby ordained and enacted by authority of the same, that it shall be unlawful from and after the approval of this ordinance, for any person or persons, firm or corporation to plant or set out, or to have planted or set out, any North Carolina poplar trees within the lines of any avenue, street, lane, alley or road of the borough of Ben Avon, under the penalty of ten dollars for each tree planted or set out, to be recoverable to the use of the borough as fines and penalties are by law recoverable.

"Sec. 2. That the Street Committee of Council is hereby authorized and directed to remove, cut down and kill all North Carolina poplar trees growing on the avenues, streets, lanes, alleys and roads of the borough after thirty days from the approval of this ordinance.

"Sec. 3. That from and after the first day of April, 1906, it shall be unlawful to set out or plant any trees within the lines of any of the avenues, streets, lanes, alleys or roads of said borough in front of any lot or property. The owner of any lot or property who shall set out or plant or have set out or planted, any tree in the soil within the lines of any of the avenues, streets, lanes, alleys or roads in front of his, her, their or its property, shall be subject to a fine of ten dollars for each tree set out or planted in front of his, her, their or its property, as aforesaid, said fine to be for the use of the borough and to be collected as fines and penalties are by law recoverable. And the Street Committee of Council is hereby authorized and directed to remove said trees so set out.

"Sec. 4. Ordinance No. 157 and any ordinance or part of ordinance conflicting with the terms of this ordinance be, and the same is hereby repealed.

"Ordained and enacted into a law this 11th day of March, A. D. 1906. J. K. TURNER,
"Attest: President of Council.
"F. A SCHMUCKER,
"Secretary of Council.

"Examined and approved this 15th day of March, A. D. 1906. C. DYER,
"Burgess."

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6. Notwithstanding the protests of citizens of the borough the authorities of the borough began the enforcement of the ordinance of March 15th and began to cut down all North Carolina poplars on the streets of the borough, and proceeded until stopped by the preliminary injunction granted in this case.

7. The roots of the North Carolina poplar trees have penetrated the ground in the neighborhood of the public sewers and have in some cases penetrated the public sewers in Laurel, Watt and Monitor avenues and other streets of the borough, thereby injuring the sewers, causing them to become clogged, and reducing their capacity to carry away the sewage deposited in them.

CONCLUSIONS OF LAW.

1. The borough of Ben Avon has charge and control of the highways and sewers within its boundaries and has the power and authority to construct and maintain, and prevent by appropriate general ordinances any interference with or injury to or destruction of such public sewers.

2. The ordinance of March 16, 1906, is a general ordinance passed for the purpose of preventing injury to or destruction of the public sewers of the borough.

3. The ordinance is neither unreasonable nor arbitrary, but is properly and well within the discretion of the borough council.

4. The preliminary injunction should be dissolved and the bill dismissed.

For plaintiff, *Thomson & Thomson.*
For defendant, *James McLaren.*

Court of Common Pleas,

WASHINGTON COUNTY.

HOWARD v. BALTIMORE & OHIO RAILROAD CO.

Railroads—Personal injuries—Grade crossing. Rule of stop, look and listen—Contributory negligence.

A trial court is warranted in saying there was contributory negligence only in clear cases where the facts and inferences to be drawn from them are free from doubt. When otherwise the case is for the jury.

No. 111 August Term, 1906. Motion for judgment for defendant *non obstante veredicto* and a new trial.

Opinion by TAYLOR, J. Filed April 12, 1907.

There can be no doubt of the rule of law that "one who is struck by a moving train which was plainly visible from the point he occupied when it became his duty to stop, look and listen, must be conclusively presumed to have disregarded that rule of law and common prudence and to have gone negligently into an obvious danger." The latest case cited to us of this doctrine at the argument of these motions is found in *Ellis* v. *Pa. R. R. Co.*, 216 Pa. 415 (adv. Rept.) In the case under consideration, both the plaintiff and his driver who were in the wagon testified that they stopped their team within 20 feet of the defendant's track, looked and listened in both directions, and neither saw or heard any train approaching the crossing; that they could see for half a mile toward the west and in the neighborhood of 200 feet to the east, the direction from which the train came, and started to drive across the tracks and were on the main track; the first they knew of a train coming was three sharp toots from the wistle of the locomotive and instantly the crash came by the locomotive striking the hind wheels of the wagon just as it was leaving the track; the wagon was demolished, and contents scattered and destroyed, and plaintiff and driver knocked out of the wagon to the ground and plaintiff was injured. The engineer of the express train testified he was running at from 15 to 18 miles an hour and he did not whistle for the crossing for his fireman was ringing the bell from the time he left the Finleyville station, about 600 feet east of where the accident occurred. There was some evidence in the case that the engineer had said at one time in reference to the ringing of the bell, that the bell on his locomotive was of no account. The engineer testified on behalf of the defendant that he knew of this crossing and on this morning soon after he pulled out from Finleyville station coming toward this crossing he could see the heads of a team of horses only near the crossing and it occurred to him that they might likely be going to cross the tracks and as a precautionary measure he shut off the steam power and put

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on the air brakes and slowed down the train, but as he came in plainer view of the team the driver turned their heads as if going in a side road to a plaining mill on the same side he was then on, and that the horses heads were turned away from the crossing; he then concluded they were not going to cross; the train was in full view of them and only about 200 feet from the crossing and he released the brakes and turned on steam and was under headway. When only about 150 feet from the crossing the driver of the team pulled his horses directly on to his track and started to cross, and was struck as the plaintiff said. Owing to the fact that he had so recently applied the air brakes he could not get the results desired to bring the train to a stand-still and avoid the collision with the wagon of plaintiff, and that the driver by the movements of his team had deceived him, the engineer testified. This the plaintiff and his driver denied, testifying that there was no such slowing down of the train, in fact saw no train approaching the crossing when they stopped, looked and listened and then started over the crossing. This case, as we veiwed it under the evidence, presented an irreconcilable conflict of testimony and inferences to be drawn from plaintiff's testimony upon which we deemed it the province of the jury to pass. In the case of *Boggs* v. *Pittsburgh, McKeesport and Greensburg Railway Co.*, 216 Pa. 314, (Advance Reports) it was held, "in an action to recover damages for personal injuries sustained at a grade crossing the plaintiff testified that at the brow of the hill above the crossing, he looked both ways and saw nothing in sight; at that point he could see 500 feet in the direction from which the electric car came. He then drove down near the crossing, stopped his horse, looked, listened, and there being no car in sight or hearing, 'drove a natural gait across.' An account of the accident given by a witness for the plaintiff was not reconcilable with the account given by the plaintiff. Plaintiff also testified that if there had been any car on that hillside he could have heard it; that it was for the jury to pass upon the irreconcilable conflict of testimony, and the inference to be drawn from the plaintiff's testimony." A trial court is warranted in saying there was contributory negligence only in clear cases where the facts and inferences to be drawn from them are free from doubt. When the facts and inferences to be drawn from them are not free from doubt the case is for the jury, so in the present case. *Mortimer* v. *Beaver Valley Traction Co.*, 216 Pa. 326, (Advance Reports).

For the reasons above set forth, as well as the conflict of evidence on the whole case we refused to affirm defendant's fourth and fifth points, believing it a case for the jury.

That the verdict of the jury is excessive and not warranted by the evidence we cannot hold. The plaintiff testified to a loss of earning capacity by reason of injury to eyesight attributable to this accident. The jury evidently believed him on this point. The fact that the plaintiff is himself a physician and was corroborated slightly on this point by one of the physicians who attended him doubtless caused the jury to adopt as true their statement as to the permanent injury rather than the testimony of the physician called by the defense who also had attended the plaintiff and gave it as his opinion the plaintiff was not permantly injured. That the verdict of the jury was against the evidence and law has been already covered in this opinion.

An now, April 12, 1907, this cause came on to be heard on motion for judgment for the defendant company *non obstante veredicto* and new trial and was argued by counsel, whereupon, upon due consideration, the motions for judgment for defendant *non obstante veredicto* and for a new trial are overruled and refused and judgment ordered to be entered for the plaintiff on the verdict of the jury on papment of the jury fee.

April 18, 1907, comes the defendant by his counsel and excepts to the refusal of the court to enter judgment for the defendant *non obstante veredicto*, and the dismissal of said motion, and the decree ordering judgment for the plaintiff on the verdict of the jury and at their instance exception noted and bill sealed for defendant.

For plaintiff, *T. F. Berch* and *Mr. Snee.*
For defendant, *McIlvaine* and *Clark.*

[From Harry Russell Myers, Esq., Washington, Pa.]

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Executive Department,

HARRISBURG.

PUCLIC DRAINAGE.

Sewers—State regulation of—State permit for—Restraining construction and use of—Act of 1905, P. L. 260.

The act of April 22, 1905, P. L. 260, by sections 4 and 5, distinctly prohibits any municipality from discharging sewage into any of the waters of the state unless a permit shall have been issued for such sewage system.

It falls within the well-settled jurisdiction of a court of equity to restrain the construction of a sewer, which, in case of use, will constitute a source of defilement of the waters of the state to the danger of health.

The governor, attorney-general, and commissioner of health, acting under the authority of the act of 1905, P. L. 260, are perfectly competent to become parties plaintiff in a bill in equity to restrain.

Requset of Commissioner of Health Dixon for opinion.

Opinion by CARSON, Attorney-General. Filed December 28, 1906.

You call my attention to an interpretation by some municipalities in this commonwealth upon the act entitled "An act to preserve the purity of the waters of the state, for the protection of the public health" (P. L. 1905, 260), under which it is contended that, while the governor, attorney-general and commissioner of health have power to prevent sewage from flowing into streams, yet they cannot restrain the building of a sewer, from which it is plain that the moment the sewer is put into use it will result in a discharge of sewage into such streams.

You also call my attention to the fact that sewers are now being built in different parts of the state, which the officers above mentioned will not be able to approve, and that hence the disastrous condition will result in the expenditure by the municipalities of large sums of money for unsanitary sewerage systems, and you ask the question whether the municipalities can be restrained by the state officers from building such sewers until they first obtain a permit. And you call my attention to a bill filed by a taxpayer in the county of Blair against the borough of Holidaysburg, in which equitable relief is sought against the construction of such a sewer on the ground that the moneys of the taxpayers were being improvidently expended.

The act of April 22, 1905, P. L. 260, by sections 4 and 5, distinctly prohibits any municipality from discharging sewage into any of the waters of the state unless a permit shall have been issued for such sewage system. While the act does not in terms prohibit the construction of a sewer without a permit first being granted, yet it forbids its use without such permit. Inasmuch as the construction of a sewer, which, in case of use, will constitute a source of defilement of the waters of the state to the danger of health, is a distinct menace, it appears to me to fall within the well-settled jurisdiction of a court of equity to restrain that which will manifestly be prejudicial to the public health, and this aside entirely from the question of the expenditure of the taxpayers' money. The officers charged under the act of assembly with the duty of inspecting and granting permits for the use of sewerage sytems seem to be the most proper officers to be parties plaintiff in a bill to restrain such a structure, whether in the course of erection or after completion, but upon the eve of a threatened use to the detriment of the public health.

Hence I reply that, in my judgment, it is perfectly competent for the governor, attorney-general and commissioner of health, acting under the authority of the act referred to in the opening of this opinion, to become parties plaintiff in such a bill.

See Pottstown Drainage, 33 Pa. C. C. R. 191.

[From Paul A. Kunkle, Esq., Harrisburg, Pa.]

A provision in a will vesting a fund in a trustee with directions to pay the income to testator's son until he attains a certain age, when the fund shall become his absolutely, that, in case the son dies before reaching such age, "it shall go to his heirs," is held, in Bennett v. Bennett (Ill.) 4 L. R. A. (N. S.) 470, not to vest the title in the son under the rule in Shelley's Case, so as to defeat the testator's intention, but is to be regarded as one of purchase or substitution

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PITTSBURGH, PA., JUNE 5, 1907.

Court of Common Pleas No. 2,

ALLEGHENY COUNTY.

WILT v. DUQUESNE NATIONAL BANK, et al.

Trusts—Evidence in writing—Statute of limitations.

In an action to declare defendant trustee of certain real estate plaintiff offered to prove an oral agreement that defendant should buy the property at sheriff's sale and hold it for sale and after paying defendant's claim pay the balance over to plaintiff. Held, that such a trust must be evidenced by writing and action be brought thereon within five years.

No. 526 October Term, 1909.

Opinion by SHAFER, J. Filed February 9, 1907.

The bill is to declare the defendants to be trustees for the plaintiff of certain lands, and the proceeds of other lands sold by them, and for an account.

FINDING OF FACTS.

1. On and before April 14, 1893, E. D. Wilt, the plaintiff herein, was the owner of three pieces of property situated in the city of Pittsburgh and described in the second paragraph of his bill.

2. On that date he entered into partnership with one, Thomas H. Phelps, under the name of E. D. Wilt & Company, for the purpose of erecting a theater building, and the partnership shortly thereafter purchased a lot of ground on Collins avenue in the Nineteenth ward of the city of Pittsburgh, described in the first paragraph of the bill, and proceeded to erect thereon a theater and hotel building and stores. In the purchase of this lot the firm of E. D. Wilt & Company, in April, 1903, made its note, which was discounted by the Duquesne National Bank, one of the defendants, and thereafter other notes were discounted by said bank for said firm. The plaintiff also mortgaged, for the purpose of raising money to be used in the construction of the theater, two of his lots mentioned in the first paragraph.

3. On December 19, 1894, the plaintiff and his partner, Phelps, made a voluntary assignment for the benefit of creditors to the Fidelity Title & Trust Company, one of the defendants, and thereafter, in 1895, suits were brought upon the mortgages made by the plaintiff, and upon a mortgage made by plaintiff's predecessor in title, upon all three lots owned by the plaintiff in severalty as above mentioned, and judgments were entered against him, and the properties were advertised at sheriff's sale. Upon the trial, the plaintiff offered to prove the statements of the fifth paragraph of the bill, namely, that it was agreed by parol between the plaintiff and the Duquesne National Bank that the properties should be bought in by the Duquesne National Bank at sheriff's sale, in case they were not bid up to their value; that the bank should pay the purchase money to the sheriff and take a deed for the properties, and that the bank should then hold them as security for the indebtedness of the plaintiff to the bank, until they could be sold to advantage, and that in the meantime the plaintiff should collect the rents of the properties and pay them over to the bank, and that any surplus arising from the rents and sales of the property, over and above the indebetness of the plaintiff to the bank, should be paid to the plaintiff; and that, afterwards, in 1901, the Duquesne National Bank without the consent of the plaintiff sold one of the properties, and in 1903 and 1904 respectively sold the other two properties, plaintiff assenting to these sales.

4. The plaintiff also offered to prove on the trial by parol evidence that in the year 1896, a corporation known as the East End Opera House Company was formed for the purpose of buying the theater which had been built by the plaintiff and Phelps; that the Fidelity Title & Trust Company, the assignee for the benefit of creditors, by leave of court, made an arrangement with the

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creditors to convey the theater property to one, John Kelly, who conveyed the same to the Opera House Company, receiving therefor a certain amount of the capital stock of that company, and that about $18,000 of that stock was distributed to the plaintiff as the consideration for a release by the Duquesne National Bank of the lien of its judgments against the plaintiff on the opera house property, and that this stock was, as part of the arrangement, assigned to the Duquesne National Bank as additional security for its claims against the plaintiff; and that afterwards, in the year 1900, it was agreed between the plaintiff, the Duquesne National Bank and John Munhall, who was one of the directors of the bank, that the bank should purchase from the Opera House Company the Opera House property and take the title in the name of John Munhall, and that the property was to be held in that way as security for the indebtedness of the plaintiff to the bank, until the plaintiff could raise the money and pay it off, and that thereupon the property was to be conveyed to the plaintiff, and that the bank did advance the money and purchased the property from the Opera House Company, and took the title in the name of John Munhall.

5. That, afterwards, John Munhall died, leaving a will, the executors of which are made parties defendant, as well as the heirs and devisees of Munhall. And that the plaintiff had collected the rents of the property and deposited them with the bank since the making of that arrangement.

6. An objection to each of these offers was sustained, and the evidence excluded.

CONCLUSIONS OF LAW.

Upon this state of the evidence, the plaintiff is not entitled to any relief. The only question in the case is whether or not the evidence so offered should have been received. The objections to it are that the evidence must either be treated as showing a defeasance of the deeds above mentioned so as to turn them into mortgages for the security of the debts owed by the plaintiff to the bank, or else as establishing a trust in the bank and in John Munhall for the plaintiff, and that if the evidence tends to establish a defeasance it cannot be received because it is not written as required by the act, and that if the object of the conveyance is to establish a trust, the evidence is not to be received because such trust must be mainfested in writing signed by the party holding the title, and that at any rate, if a trust was created by the agreements and under the circumstances set out in the offer, no action can now be maintained to enforce it, because more than five years elapsed from the time that the trust occurred until the filing of the bill herein. We are of opinion that these objections were well taken and that the evidence was not admissible.

The bill must therefore be dismissed with costs to be paid by plaintiff.

For plaintiff, *White, Childs & Scott* and *William LeGoullon.*

For defendant, *W. B. Rodgers.*

(Common Pleas No. 2, Allegheny Co.)

COLONIAL TRUST CO., Admr., v. HOFFSTOT et al.

Preliminary injunction—Stipulation of parties. Relief therefrom.

Where on bill for a preliminary injunction the parties enter into a stipulation as to procedure which relieves the court from a decision on the injunction, the court has power at any time to relieve one party from the stipulation and hear the case on preliminary injunction.

No. 1174 April Term, 1906. Sur petition of defendants for leave to withdraw from stipulation.

Opinion by SHAFER, J. Filed July 16, 1906.

The bill herein was filed in the latter part of March, 1906, and an application was made for a preliminary injunction to prevent the sale by the defendants of certain bonds and stocks which the defendants claimed to have a right to sell by virtue of certain contracts made with the plaintiff's decedent. After some discussion upon the application the parties on March 29, 1906, entered into the stipulation in question, which was substantially to the effect that the bonds and stocks in question should not be sold until after final hearing and decree of this court, and that the hearing should be speeded by waiver of time for answering,

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etc., and that the postponement of the sale in this way should not prejudice the rights of the defendants. It was supposed by both parties at the time of entering into this stipulation that the trial would not last more than two or three weeks at most, and that a decree might be made in June. The trial has already lasted many times as long as it was at first supposed it would last. It is not questioned by either party that it is impracticable to finish the case, argue the same, and have the same properly considered by the court without putting it over the summer vacation of six weeks from the 16th of July to the first of September. The defense has not yet closed its case, and the further hearing has been adjourned until the third of September next. In view of the necessity for such continuance of the case, the defendants made the application now under consideration which is to allow them to withdraw from the stipulation not to sell the bonds and stocks in question, and having done so to take up the application for a preliminary injunction or to allow a new application to be made if desired by the plaintiffs; the grounds for the application being the misapprehension as to the length of time which the case would take and the fact that the defendants were put to great expense in carrying the debts of C. Jutte & Company, from which they could, as they say, partially relieve themselves if they were allowed to sell the bonds and stocks in question, and thereby procure the release of some of the property of the company from the mortgage securing the bonds and make this property available for the payment of other debts. To this petition the plaintiffs answer, first, that it is not in the power of the court to relieve the defendants from the stipulation, it being a contract inter partes for a valuable consideration, and, second, that it would be inequitable, even if it were within the power of the court, for the reason that the parties could not be put in the same situation—that a sale in the summer vacation would be very disadvantageous to the plaintiffs, and that the status of the parties ought not to be changed pending the litigation, especially when it has progressed so far towards a final determination.

As to the power of the court, under the circumstances, to relieve the defendants from their stipulation, there can be no doubt that the court has power and that it has been exercised in numerous cases to relieve from stipulations concerning procedure in the cause, and we are inclined to think that a stipulation filed in a case which relieves the court from the decision of an application for a preliminary injunction, and is in effect a substitute for such an injunction, is under the control of the court as such an injunction itself would be, even though it takes the form of a contract between the parties founded upon a consideration. We do not, however, deem it necessary to decide that matter in this case for the reason that upon consideration of the allegations of the petition and answer and the evidence taken thereon and of the nature of the issues which have been presented by the pleadings in the case, and of the state of advancement of the trial of those issues, the inconvenience which the defendants claim they can at least partially avoid if allowed to proceed with the sale, is not a sufficient reason for allowing them to withdraw from their stipulation, or what is in effect the same thing, dissolving the preliminary injunction forbidding such sale, if such injunction had been granted instead of the stipulation.

Without, therefore, discussing or putting any stress upon the merits of the case, which it would be improper to do under the circumstances, the hearing of evidence thereon having been begun, and not yet finished, we express simply the opinion that the defendants have not shown sufficient ground to be relieved as prayed for, and the petition is therefore dismissed.

For plaintiff, *Weil & Thorpe.*.
For defendants, *Reed, Smith, Shaw & Beal.*

Orphans' Court,

ALLEGHENY COUNTY.

In re Estate of A. BLUMBERG, Deceased.

Wills—Legacy—Charity—Power of regulation.

The power given to an executrix to "change and modify" a legacy given for the "use" of a charity is to be restricted to the regulations of use in the

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absence of express words authorizing reduction in amount.

HAWKINS, P. J.

No. 34 December Term, 1906.

STATEMENT.

(1.) The main question raised in this case is whether under a power to change, the executrix was given power to reduce the corpus, or simply to alter the scope of the following legacy:

"I give and bequeath the sum of $1000.00 one thousand dollars in cash to the Columbian Council School toward establishing a sinking fund, the interest of which shall be used toward liquidating any debts, or toward the proper support of said school. This bequest may be changed or modified by my executrix hereinafter named according to circumstances and contingencies that may arise."

There was a number of other legacies all of which were absolute in their terms, and Mrs. Blumberg was given the residue for life. Dr. Blumberg was a gentleman of education, a linguist, and a practicing phyiscian; and at the time of making his will his wife, the executrix, was a member of the board of trustees of the school. In the last analysis the question raised lies between the school and the widow as residuary legatee; for if the power of reduction exist, what the school loses, the widow will gain.

In these circumstances the executrix claims the power to reduce said legacy to $100 and has accordingly paid the school that amount, whereas the school claims the balance.

(2,) The commonwealth claims collateral inheritance tax in these circumstances:

Dr. Blumberg gave a deed of trust to the Hebrew Ladies Hospital Aid Society for certain lots upon conditions which said society failed to perform within the time specified, but which default the executrix and next of kin waived in consideration of the release of a legacy of $1,000 given by him to endow a room in such hospital, and a subscription of $500 toward the establishment of such hospital undertaken by said Hebrew Ladies Hospital Aid Society.

It is contended on behalf of the commonwealth that the consideration of this gift being testamentary it is liable to the tax.

OPINION. Filed April 12, 1907.

(1.) There can be no doubt that the Columbia School was the preferred object of testator's bounty. The dispository clause shows that it was the first in thought; and that the gift was express in terms, and absolute in character. The purpose is plainly and definitely set forth and can only be changed by equivalent phrase. The power was given in the following clause to "change and modify" the gift; but what was the scope of this power? Certainly testator could not have contemplated a change of objects, because no substitute was provided. Mrs. Blumberg was given power to "change and modify;" but there is no suggestion that she should have any beneficial interest as a result of the exercise of the power. The bare implication that she would take in the event of reduction in the amount of the legacy is inconsistent with the well settled rule of construction which requires equivalent phrase to reduce an antecedent gift. If testator had her in mind as a alternative beneficiary, he would doubtless have said so in express terms. In view of the fact that all other legacies were absolute, it is not credible that this legacy toward which his wife stood in a fiduciary relation, should alone have been made subject to revocation. Her trust relation would be inconsistent with the implication of a power which might place her in the embarrassing position of sacrificing her *cestui que* trust in her own interest. Nor does the phrase "change and modify" necessarily imply a power to reduce the amount of the legacy. It is just as applicable to an alteration in the use to which the fund shall be applied and must be so construed as to support testator's clearly announced intention to give the Columbia School the benefit of the $1,000 legacy: *Good* v. *Fichthorn* 144 Pa. 287. "Circumstances and contingencies" might arise in which the power must become operative in some way. It seems clear from what has been written that it cannot operate by way of reduction; and the alternative lies in change and modification of use. It will be observed that the dispository clause provides for specific use of the fund; but "circumstances and contingencies" might arise in the life of the school which would make a change desirable.

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Thus its development, or management, or indeed its preservation, might make the use of the principal in whole or in part essential. These were questions of fact whose decision Mrs. Blumberg would be in a position as one of the directors to decide. On the face of the will, the school was the sole object of bounty. She might enlarge this bounty by enlarging the power of use; but could not reduce. It follows that the view taken by the executrix was erroneous and the school is entitled to the whole legacy of $1,000.

(2.) The release of a legacy is not a recognized method of escaping the liability for collateral inheritance tax. It is simply a method of satisfaction, and cannot prejudice the vested right of the commonwealth. On the face of the statement the Hebrew Hospital had no title to the land conveyed by the widow and heirs; its right had been forfeited by lapse of time, and the release of its legacy was part consideration in its purchase of the land.

For accountants, *Sachs & Hirschfield* and *J. M. Shields.*

For claimant, *Weil & Thorpe.*

For commonwealth, *A. S. Miller* and *Wm. M. Benham.*

Executive Department,

HARRISBURG.

WOLF'S ELECTION CERTIFICATE.

Election law—Contested elections—Issuance of certificate—Alderman—Filing acceptance of office—When appeal operates as supersedeas. Acts of 1859, 1877, 1839, 1845, 1889 and 1897.

V. was duly commissioned April 19, 1906, as alderman of the Eighth ward of Allegheny city. On March 19, 1906, W. instituted proper proceedings to contest the election of V. and on March 2, 1907, the quarter sessions court decreed that W. was elected and a certificate of his election, held February 21, 1906, was filed in the office of the secretary of the commonwealth March 12, 1907. V. took an appeal to the Supreme Court, which was not a supersedeas. Held, that a commission should be issued to W.

The filing of an acceptance of the office of alderman or justice of the peace in the office of the prothonotary, as required by the act of 1877, is not necessary upon the part of one who is a successful contestant of the election, at least where the contest is not decided until more than thirty days after the election.

In the absence of a supersedeas there is nothing to prevent the enforcement of the judgment of the court below. There is nothing in the act of April 26, 1889, P. L. 60, to indicate that the governor is to await the final disposition of the contest in an appellate court before issuing a commission.

Request of Governor STUART for opinion.

Opinion by CUNNINGHAM, Asst. Deputy Attorney-General. Filed April 19, 1907.

Your letters of April 11, 1907, referring to me for advice the certificate of election of George Wolf to be an alderman in and for the Eighth ward of the city of Allegheny, county of Allegheny, Pa., also copy of decree of the court of quarter sessions of Allegheny county, and certificates and correspondence in relation thereto, has been received.

From an exanination of the certificates and papers before me, I find the existence of the following facts:

At the election held February 21, 1906, Charles Von Moss was returned by the election board as a duly elected alderman and justice of the peace for the Eighth ward of the city of Allegheny, Pa; that the said Charles Von Moss filed in the office of the prothonotary of Allegheny county, within thirty days after the election, his acceptance of said office as required by the acts of April 13, 1859, P. L. 592, and March 22, 1877, P. L. 12 (as per opinion of Deputy Attorney-General Snodgrass, construing said acts, reported in 4 Pa. C. C. R. 539),and that the said prothonotary certified the same, under his seal of office, to the secretary of the commonwealth, as required by said act of March 22, 1877, supra.

That, on March 19, 1906, one George Wolf instituted proper proceedings in the court of quarter sessions of Allegheny county at No. 79 December term, 1905, to contest the election of the said Charles Von Moss, and that a certificate from the clerk of said court of quarter seesions of Alleghney county, under date of April 10, 1906, to the effect

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that said contest had been instituted, was filed in the office of the secretary of the commonwealth, on April 16, 1906.

That Hon. Samuel W. Pennypacker, then governor of the commonwealth, under advice of the deputy attorney-general, issued to the said Charles Von Moss, under date of April 19, 1906, a commission as alderman of said ward in said city.

That on March 2, 1907, the court of quarter sessions of Allegheny county handed down its decree in said contested election, finding that the said George Wolf had received two hundred and seveteen (217) legal votes for the said office, and that the said Charles Von Moss had received but two hundred and fifteen (215) legal votes for the said office; that the said George Wolf, contestant, was legally elected to said office, and ordering that "a proper certificate thereof be issued."

That on March 12, 1907, the certificate of the prothonotary of Alleghney county, under date of March 8, 1907, was filed in the office of the secretary of the commonwealth, certifying that the said George Wolf was duly elected to said office at the election held on February 21, 1906.

In addition to the above facts, appearing of record, I am informally advised by counsel for the said George Wolf that an appeal has been taken from the judgment of the court of quarter sessions of Allegheny county, entered March 2, 1907, in favor of the said George Wolf as aforesaid, to the Supreme Court, but that said appeal has not been made a supersedeas, either by order of the appellate court or the court below.

Under these facts, you ask to be advised as to whether a commission should now be issued to the said George Wolf.

The act of June 21, 1839, P. L. 376, entitled "An act providing for the election of alderman and justices of the peace," after making provision for contesting the election in section 3 thereof, proceeds as follows:

"And such complaint shall not be valid or regarded by the court unless the same shall have been filed within ten (now thirty) days after the election, in the prothonotary's (now clerk's) office, and in case such complaint be filed in due time the protnonotary (now clerk) shall transmit by mail immediately to the governor a certified copy thereof, and in such case no commissisn shall be issued until the court shall have determined and adjudged on such complaint as aforesaid."

The act of April 15, 1845, P. L. 470, in section 21, provides as follows:

"That in all cases where the election of the justices of the peace shall be contested, the justices then in commission shall continue to exercise and discharge the duties of their respective offices until their successors are duly commissioned and qualified."

But the act of April 26, 1889, P. L. 60, entitled "An act providing for the issuing of commissions in cases of contested elections," is as follows:

"Section 1. Be it enacted, etc., That from and after the passage of this act, whenever it shall appear by the returns of election laid before the governor, by the secretary of the commonwealth, as now required by law, that any person has been duly elected to the office of prothonotary, clerk of the courts, recorder of deeds, or register of wills, judge, or any other officer receiving a commission from the governor, in any of the several counties of this commonwealth, it shall be the duty of the governor to issue a commission to such person, notwithstanding that the election of such person to any or either of said offices may be contested, in the manner now provided by law; Provided, that whenever it shall appear by the decision of the proper tribunal having jurisdiction of said contested election, that the person to whom said commissions shall have issued, has not been legally elected to the office for which he has been commissioned, then a commission shall issue to the person who shall appear legally elected to said office, the issuing of which commission shall nullify and make void the commission already issued, and all power and authority under said commission first issued shall thereupon cease and determine; Provided, further, that this act shall not in any manner affect any contest now pending."

As a justice of the peace of a township, borough, or ward in a borough, or alderman, as he is designated in a ward of a city, is an "officer receiving a commission from the

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governor," it was the duty of Governor Pennypacker to issue a commission to the said Charles Von Moss notwithstanding the fact that his election was contested. The purpose of the act of 1889, supra, is to provide that the governor shall act upon the prima facie state of affairs as they exist upon the election returns, and take such subsequent action as a change in the circumstances may demand. Hence, it is provided by said act that, "whenever it shall appear by the decision of the proper tribunal having jurisdiction of said contested election that the person to whom said commission shall have been issued has not been legally elected to the office for which he has been commissioned, then a commission shall be issued to the person who shall appear legally elected to said office, the issuing of which commission shall nullify and make void the commission already issued."

The only reasons that might now be urged against the issuing of a commission to the successful contestant, George Wolf, are:

1. That there is no evidence that he has filed in the office of the prothonotary of Allegheny county a certificate of his acceptance of the office as required by the act of 1877, supra, which fact is to be certified by the prothonotary to the secretary of the commonwealth prior to the issuing of a commission; and

2. That, by reason of the appeal from the judgment of the court of quarter sessions of Allegheny county to the Supreme Court, it does not yet "appear by the decision of the proper tribunal, having jurisdiction of said contested election," that the said Charles Von Moss was not legally elected to the office.

With reference to the first reason, I am of the opinion that the filing of such acceptance is not necessary upon the part of one who is a successful contestant of the election, at least where the contest is not decided by the court until more than thirty days after the election. The acceptance of the officer is to be filed within thirty days after the election, and if an alderman or justice of the peace fails to file such acceptance within thirty days after the election, it is only proper that he should be held, by implication, to have declined said office. This is the substance of the opinion rendered by Deputy Attorney-General Snodgrass, 4 Pa. C. C. R. 539.

In the case in hand, the said George Wolf could not possibly have filed such acceptance within thirty days after the election. That he desires to accept the office is evidenced by the fact that he has instituted a contest therefor, and carried it to a successful conclusion in the court below. It would be manifestly unjust to deprive him of the fruits of this victory by refusing him a commission because he has not done something it was not within his power to do.

With reference to the second reason, it may be stated that the appeal of the said Charles Von Moss from the judgment of the court of quarter sessions of Allegheny conuty must have been taken subject to the provisions of section 12 of the act of May 19, 1897, P. L. 67, which provides as follows:

"In appeals in contested election cases, the appeal shall not operate as a supersedeas, unless so ordered by the court below, or the appellate court, or any judge thereof, either by general rule, or special order, and upon such terms as may be required by the court or judge granting the order of supersedeas."

As above stated, I am informally advised that the appeal was not made a supersedeas.

"An appeal is a mere incident to an action; a judgment is the result or consequence of the action, and the appeal is the mode of seeking to have the judgment of the inferior court corrected by the appellate tribunal. An appeal is the commencement of a new proceeding in an action after its determination by the rendition of a final judgment, and is distinct from that which results in its recovery." Am. and Eng. Ency. of Law, Vol. 2, page 426, note.

A supersedeas has the effect of suspending further proceedings in relation to a judgment, but it does not, like a reversal, annul the judgment. It is preventative in its nature, but does not set aside what the trial court has already adjudicated. In the absence of a supersedeas there is nothing to prevent the enforcement of the judgment of the court below. There is nothing in the act of 1889 to indicate that the gouernor is to await the final disposition of the contest

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in an appellate court before issuing a commission.

I am, therefore, of the opinion that the taking of the appeal should not in any way affect your action on the facts as they existed after the rendition of the judgment of the court of quarter sessions of Allegheny county; and as that judgment is "the decision of the proper tribunal having jurisdiction of the contested election," deciding that the said George Wolf has been legally elected to said office, a commission should now be issued by you to him.

[From Paul A. Kunkle, Esq., Harrisburg, Pa.]

Pennsylvania Bar Association.

The thirteenth annual meeting of the Pennsylvania Bar Association will be held at the Bedford Springs Hotel, Bedford, Pennsylvania, on Tuesday, Wednesday and Thursday, June 25th, 26th and 27th, 1907.

Thomas Patterson, Esq., of Pittsburgh, Allegheny county, Pa., will deliver the president's address on Tuesday, June 25th, at 2 p. m.

The annual address will be delivered the same evening, at 8 o'clock, by Hon. George Gray, of Delaware, judge of the Circiut Court of the United States for the third judicial circuit.

Short papers, followed by a discussion of each paper, will be read as follows:

Edward J. Fox, Esq., Easton, "The Legal Aspects of the Trial of Christ."

Hon. Michael William Jacobs, Harrisburg, "The Guarantees of Liberty in the Early Law of Pennsylvania."

Hon. John D. Shafer, Pittsburgh, "The History of the Law as Part of the Course of Study Required for Admission to the Bar."

Hon. Walter George Smith, Phildadelphia, Uniform Divorce Laws."

"The thirteenth annual banquet will be held at the Bedford Springs Hotel on Thursday, June 27th, at 7:30 p. m.

Thomas Patterson, Esq., Pittsburgh, the president of the association, will be the toastmaster.

Responses to toasts are expected from the governor of the commonwealth of Pennsylvania; Hon. George Gray, Wilmington, Delaware; William D. Evans, Esq., Pittsburgh, Pa., and Col. Charles M. Clement, Sunbury, Pa.

Excursion tickets to Bedford Springs can be purchased at the usual summer excursion rates on application to the local railroads ticket agent.

Reservation of rooms can be made by written application to H. E. Bemis, manager, Bedford Springs Hotel, Bedford, Pa.

The association requests the judges of counties whose "court calendars" conflict with this annual meeting of the association kindly to suspend their rules and arrange their court business so as to permit the attendance of the members of the association at this annual meeting.

The usual circular notices to members of the association will be mailed later.

WILLIAM H. STAAKE,
Secretary Pa. Bar Association.

Philadelphia, May 21, 1907.

A note endorsed by an accommodation indorser, before delivery, for the interest due on outlawed notes, upon which he was jointly and severally liable, is held, in Medomak Nat. Bank v. Wyman (Me.) 4 L. R. A. (N. S.) 562, to remove as to him the bar from the earlier notes.

The authority of officers of subordinate lodges of bevolent societies, by reason merely of such office, to waive any of the provisions of the rules and regulations of the order which enter into and form a part of the contract of membership, is denied in Royal Highlanders v. Scovill (Neb.) 4 L. R. A. (N. S.) 421.

A person who receives a check drawn on a bank in another place is held, in Lewis, H. & Co. v. Montgomery Supply Co. (W. Va.) 4 L. R. A. (N. S.) 132, not to be required to transmit such check by the only or last mail of the day next after its receipt, if such mail closes or departs at an hour so early as to render it inconvenient for the holder to avail himself of it.

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Pittsburgh Legal Journal
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EDWARD B. VAILL, THOMAS EWING, } EDITORS

N. S. Vol. XXXVII. O. S. Vol. LIV. } No. 48.

PITTSBURGH, PA., JUNE 12, 1907.

Court of Common Pleas,

SOMERSET COUNTY.

BERKEY v. THE BERWIND-WHITE COAL MINING CO.

Mines and mining—Surface owner—Right of support—Injunction.

The owner and lessees of a vein of coal will be enjoined upon a bill of complaint filed by the surface owner from the removal of the pillar coal remaining in place where the evidence shows that there was no release or waiver of the right of surface support in the grant of the coal, and that permanent injuries of a continued nature will result to the surface estate by the mining and removal of the pillars.

The fact that the pecuniary damage which may result to the surface estate would be considerably less than the profit accuring to the owner and lessee of the coal if they were permitted to mine and remove the same will not prevent the relief prayed for by permanent injunction.

The loss to the owner and lessee of the coal, resulting from such injunction, is the result of the established judicial construction placed on contracts and grants of this character, and arises because of the surface-owners absolute right to have his reserved estate supported precisely as it was in its natural state.

Where the act complained of is tortious there can be no balancing of conveniences, or of relative losses or gains involved in restraining the removal of the coal on the one hand, or the mining and marketing of the same on the other hand.

No. 4 Equity Docket, 1906.

Opinion by KOOSER, P. J. Filed January 14, 1907.

For a time prior, and to November 30, 1892, plaintiff was the owner of the entirety of the land about which this dispute arises. He is yet the owner of the surface. On November 30, 1892, he conveyed to Robert H. Sayre all the coal and minerals under the farm, excepting the limestone, and June 12, 1895, Sayre conveyed the same to the Wilmore Coal Company, and under agreement with this company, the defendant company, has for several years been mining out the coal from the "B" or "Miller seam," under this farm—approaching and entering it by drifts or slopes through the same seam under adjoining lands. In its operations the defendant company had mined out much, perhaps most of the coal of this seam on the adjoining farms, and on approximately half of this farm had completed its work, and had drawn the pillars of coal before preliminary injunction was granted. And also, before the injunction was granted, the defendant company had driven headings and mined out rooms under the remaining portion of this farm, but the ribs and pillars of coal yet remain. Before the injunction was granted, the springs of water on the farm (perhaps half a dozen of varying strength) had entirely failed and sundry depressions appeared in the surface.

In the conveyance of the coal from plaintiff to Sayre there is no clause waiving the right to damages that might result to the surface from the removal of the coal.

Alleging a right to absolute support of the surface and of the limestone reserved, the plaintiff charges the defendant with mining and removing the coal in a negligent manner, and regardless of his rights; avers the acts are prejudicial to his rights and destructive of his property; that these are trespasses, and of a continuing and permanent character, and that he is sustaining irreparable injury.

Other, and what appears to us minor, matters are alleged in the bill, of which, later, we will find the facts, as we understand the proofs.

Under these facts as averred in the bill, presented *ex parte*, the preliminary injunction was granted.

The defendant company denies, in answer, that it has mined the coal in a negligent manner; admits it is (or was) mining the coal from said seam, and avers it had then already mined out much more than one-third of the coal from under said farm; denies that the surface is broken in a manner

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that renders it almost valueless for agricultural purposes, or that the springs and fish-dam had been either wholly or partly destroyed; denies that its acts in its mining operations are contrary to law and equity, and prejudicial to the rights of the plaintiff and destructive to his property, and avers that for any pretended injury plaintiff has an adequate remedy at law. Defendant further avers that before the granting of the injunction the coal had been mined out to such an extent that whatever damage might result to the springs and fish-dam had already been done; and that although not required to leave coal under the buildings, it had done so.

The defendant further alleges that interference with its mining operations now, under this farm, by writ of injunction will cause much greater damages to it than the entire value of the surface "or fee" owned by the plaintiff, and that it would be inequitabte to restrain its operations, etc.

Plaintiff asks that the injunction be made perpetual, and the defendant that it be dismissed.

The foregoing does not recite the averments and denials of the bill and answer in full, but sufficiently, I think, to aid in more quickly understanding the relation of the facts yet to be found to the case.

From the proofs we find the following:

FINDINGS OF FACT.

1. On the hearing, November 15, 1906, on motion of its solicitors filed, the Wilmore Coal Company was permitted to intervene as defendants.

2. Prior to the 30th day of November, 1892 (and from 1884) the plaintiff was the owner in fee of the entirety of a certain farm in Paint township, Somerset county, Pa., adjoining lands of Jacob A. Weaver, Peter Hoffman, David Shaffer's heirs, John Jones, Josiah Plough and Alfred Gahagan, containing 119 acres and 133 perches, and on the said 30th day of November, 1892, he conveyed to Robert H. Sayre all the coal and minerals in and underlying the said farm, excepting the limestone, describing the farm by metes and bounds, and with the following rights and privileges: "Together with the free and uninterrupted right-of-way into and through said lands, and to build, keep and maintain roads and ways in and through said mines forever for the transportation of said coal, etc., and of coal and other necessary things for mining purposes, from and to other lands, with the right to mine and carry away all of said coal and minerals, and with all the mining rights and privileges necessary or convenient to such mining and removal of same, or by reason of the manufacture of the said coal into coke or other products at such places as may be selected by said second party, his heirs and assigns. Said second party agrees to pay for any such surface used for mining, etc., the general price for such land."

On the 12th day of June, 1895, Robert H. Sayre et al. conveyed said coal and minerals to the Wilmore Coal Company, with the mining rights and privileges above stated.

The plaintiff is yet the owner of the surface soil and the limestone he reserved.

3. The Berwind-White Coal Mining Company, a corporation organized under the laws of Pennsylvania, is the lessee under the Wilmore Coal Company of the said coal. It commenced the mining and removal of the coal in said "bed B" or "Miller seam," under plaintiff's farm, in the spring of 1902, and has been mining practically continually therein since. It has already mined, and before the granting of the preliminary injunction in this case had mined all the coal and removed the pillars and supports from somewhat more than one-half of said farm, and under the remainder of the farm (and also before the preliminary injunction was granted) headings had been driven and rooms cut off and the coal removed therefrom, but the pillars and ribs were left standing and have not yet been removed.

The mining operations under this farm have been conducted by drifts or slopes through the same seam on adjoining lands, and from openings or mine mouths at a remote distance from plaintiff's farm.

4. The thickness of the covering over the "B" seam on this Berkey farm is variable, ranging from 97 feet, the thinest cover in the northeast, along the Gahegan line, to 202 feet at or near the dwelling house, and to 279 feet in the south part (the average being about 150 feet). The "limestone" or "D"

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seam lies from 130 to 135 feet above the "B," and "D" seam and "C" prime and "C" seams overlie the "B" over the greater part of the farm. Ordinarily bed "D" overlies immediately a bed of limestone about 2 feet in thickness; but I am unable to find from the evidence that it so lies on this farm or in this neighborhood. The plaintiff prospected for this limestone, but failed to find it, and says he knows of none opened on farms near this one. Plaintiff's witness, Fetterman, (pages 7 and 8) says limestone sometimes underlies "B" seam, and sometimes does not. The seams above "B" are owned by the Wilmore Coal Company under same conveyance as "B" from plaintiff, and interference with the covering over "B," causing cracks and depressions in the surface, would interfere with the coal strata above "B," with like effect as with the stratum of limestone above, if there be limestone there.

5. The rooms off the headings are mined to a width averaging from 30 to 35 feet, and about 400 feet in length, and the pillars left standing are 33 feet thick. The headings are 16 feet wide, with a parallel back-heading or air-course 14 to 15 feet wide, with a pillar or wall of coal between them; through this pillar or wall between the heading and the air-course, crosscuts are made at intervals, and these closed with brattice boards and the mining progresses.

6. There were on this farm ten or eleven springs of water of varying strength, but all constant, three or four of them strong, the one at or near the dwelling house being one of the strong springs, and they all ceased flowing in the summer and fall of 1904, and as early as September 15th. Since then none of them has been constant. During wet seasons, of several months in each year, they supply sufficient water for the use of the farm, but are useless during the rest of the year.

The loss of the springs had depreciated the value of this farm greatly. The loss of water from the springs constitutes the principle item of damages suffered by the plaintiff by reason of the mining operations of the defendant. Any injury to the springs by mining operations of defendant was done before the preliminary injunction in this case was granted.

7. At eight or nine different places upon the eastern side of the farm from under which the coal was first mined and the pillars drawn, the surface has subsided, leaving depressions of varying sizes of from about 500 feet by 300 feet to about 157 feet by 97 feet, and varying in depth at about their middle (to which they slope gradually) from one to two and a half feet. There were also several cracks in the surface, about the edges of some of these depressions from 100 feet to 300 feet, some at their widest places about four inches. These depressions and cracks were first discovered in the spring or summer of 1905, and two of the smaller depressions have appeared since the preliminary injunction was granted. These depressions have substantially depreciated the value of the farm—perhaps to the amount of several thousand dollars—that this depreciation is much less than (not one-fourth as much as) that caused by loss of water in the springs.

8. In the sale and conveyance of the coal and minerals the plaintiff did not release damages that might result to the surface from the mining and removal of the coal and minerals, and neither the owner nor the lessee of the same claims there was such release.

9. Of the lands surrounding plaintiff's farm those to the south and southwest (Hoffman and part of Shaffer) lie higher, and the others lower than plaintiff's farm. The mining had been done under these adjacent farms, and under plaintiff's farm, before the springs failed—the mining under plaintiff's farm being as heretofore stated, the removal of pillars from under the remainder.

10. The plaintiff's farm, not including the coal and minerals sold, was worth about $100 per acre before the springs were affected as found, and before the appearance of the depressions and cracks as found heretofore.

11. No mining has been done by defendant under the house or the barn of plaintiff. Rooms have been driven to block of coal left under them, but how closely I cannot say from the evidence, but from the map perhaps 25 feet from opposite corners of the barn, and perhaps 30 feet from the one corner to the house. Since the mining

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operations on the east side of the farm a narrow vertical crack had appeared in the wall of the house.

12. If the defendant company draw the pillars not standing under the western half of the farm, as before the date of the issuing of the injunction, they did under the eastern half, it will not affect the springs further, but will cause other depressions and cracks upon plaintiff's farm, which will be permanent and irreparable damage. The cover over the western half being, in the main, heavier than that over the eastern half, the depressions would be less, and the damage less than that sustained on the eastern half. These depressions occur not all at one time, but at intervals, and may continue to appear over a long period.

13. The Wilmore Coal Company, one of the defendants, is to receive from the Berwind-White Coal Mining Company, the other defendant, a royalty of 10 cents per ton for all the coal mined on said premises, and the leaving of said ribs or pillars of coal which yet remain in place on said premises would result in a yield of less royalty to the said Wilmore Coal Company by at least eighteen thousand dollars than if these ribs and pillars were mined and removed; and the net profits to the Berwind-White Coal Mining Company, by reason of its extensive improvements, machinery, appliances and equipment for mining coal, would be at least eighteen thousand dollars more if it should mine and carry away the ribs and pillars yet standing in said mine under plaintiff's farm as was done under the eastern part of said farm, leaving no support for the surface, than its profits will be if the ribs and pillars yet standing shall remain in place.

Each of these sums is several times as large as any amount of damage which the plaintiff claims has resulted, or would or might result, from the removal of said pillars.

14. Most of the springs on plaintiff's farm were located near the lines of the farm, but at least were well within the body of the farm, and one of the strongest and most valuable was near the plaintiff's dwelling house. As early as the 15th of September, 1904, all the springs on the farm had failed as constant, and plaintiff has had to haul water most of the time since.

15. The thickness of the "B" seam is from 3 feet 10 inches to 4 feet. The evidence established that if all the ribs and pillars of coal yet remaining on the premises were removed, the injury to the surface and to the seams of the coal, and the seam of limestone, if there be such seam, above "B" or "Miller seam" by any subsidance thereby would be more regular and wide-spread, and the injury to the surface less than if the ribs and pillars were left standing, and may subsidences should occur between the standing ribs. Subsidences whether at places where ribs have been drawn, or where they are permitted to remain, are an injury and damage to the surface. The thiner the seam mined and the heaver the cover, the less is the disturbance from subsidence, and the less the depression in the surface when they occur. From the cover over the "B" seam in the part of plaintiff's farm on which the pillars yet stand, I am unable to find that material depressions must appear if the ribs are allowed to stand, or if any, to even conjuncture their propable number or proportions.

16. On the 3rd of April 1906, the plaintiff filed a bill in equity to No. 4 Equity Docket, 1906, and obtained from this court a preliminary injunction restraining the defendant from removing the pillars of coal which had been left standing on said mining operations, the plaintiff alleging in said bill that by the removal of said pillars the surface would be broken and irreparable damage done to said farm, and the springs of water destroyed and other damages done, and that the plaintiff was without adequate remedy at law. This preliminary injunction was obtained without notice to the defendant.

17. On the 27th of April, 1906, the defendant filed an answer, and on the 14th and 15th of November, 1906, the court heard testimony on the motion to dissolve the preliminary injunction. At the time of the hearing leave was granted to the Wilmore Coal Company to intervene as defendants; and it was agreed by the solicitors for all the parties that the hearing then had should be final and the case disposed of as upon final hearing.

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DISCUSSION.

From the findings of fact it will appear that before plaintiff's bill was filed and the preliminary injunction was granted, the defendant company (The Berwind-White Coal Mining Company) had completed its mining operations, and drawn the ribs or pillars in bed "B," under the eastern half, or a little more than half, of plaintiff's farm, and all or nearly all of the subsidences to be found on that side of the farm had occurred; the injury to the springs and to the maple, trees was already done, and the crack in the wall of the dwelling house, whatever its cause, had appeared. The testimony admitted as to these facts is therefore not relevant only as it goes to show what will be the effect, or what would be the effect, if the mining is done similarly under the remainder of the farm where the pillars or ribs are yet standing.

The eastern part was mined from the defendants' "Eureka No. 34," and its working under the western part, at the time the injunction was issued, was from its "Eureka Mine No. 31."

It is not contended in this case that the plaintiff released the right of support to the surface when he conveyed the coal, nor is it denied that he is entitled to recover, in an action at law, compensation for any injury he may show he has sustained or may yet sustain from the removal of the coal. Counsel for defendants, as we understand them, do not question the principles declared by the Supreme Court in a long line of cases, from *Jones* v. *Wagner*, 66 Pa. 429 (1870) to date, as, that the coal estate is servient to the surface to the extent that the owner of the latter has an absolute right to have his surface supported precisely as it was in its natural state; that the purchaser of the coal takes it subject to this burden of surface support, or the substitution of permanent pillars of stone or the like; that this support is part of the reserved estate.

As above stated, the controversy herein relates to the western half of the farm. Much of the "B" seam of coal thereunder has been mined, but the pillars are yet standing. To this time this part of the surface yet remains unbroken and in its natural state. As a finding of fact depressions will occur if the pillars are removed, though depressions of a different size and character may eventually occur anyhow.

The plaintiff contends that though he has a remedy at law for compensation for any injury he may show he has sustained, he also is entitled to injunction to restrain the defendants from the removal of this remaining support which is "part and parcel of his reserved estate" (*Coleman* v. *Chadwick*, 80 Pa. 81); that he may elect if will have the remainder of his surface maintained in its natural condition; and further, that if even it be true that there may be some subsidence of his surface eventually, if no more coal is removed from under this part of his farm, he is still entitled to support as far as it can be had, and his right to support is not affected by the opinion of anyone that it would be better for the surface if all the pillars were removed and thereby the subsidence made more widespread.

The defendants ask that an injunction be dissolved and the bill dismissed, urging that the granting of an injunction is not a matter of right to the plaintiff out of grace; that the greater part of the actual injury had been done before the bill was filed, and there can be but anticipated damages from removal of the pillars; that all the injuries complained of are such as can be compensated for in an action at law for damages; and defendants are amply able to pay the amount ascertained, and that the loss and injury to the defendants by enjoining the removal of the coal would very greatly exceed any damages that would befall the defendant from removal of the coal and consequent subsidence of his surface.

Unusually extensive briefs have been prepared by counsel representing both sides of this case, and in them I find no case from either of our appellate courts passing directly on the right of a plaintiff to perpetually enjoin mine operators from the removal of the ribs of coal supporting the surface under facts anything like these in this case, and from the known diligence of the counsel concerned, I must conclude there is none such in the Pennsylvania reports.

Mr. Justice Williams, however, in *Chartiers Block Coal Co.* v. *Mellon*, 152 Pa. 286, pg. 300, says: "The courts have long recognized the servitude for support, and in a multi-

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tude of cases on both sides of the Atlantic have compelled its observance and punished its neglect. They have enforced the right to support as one existing independently of, and requiring no aid from statutes or contracts, and as resting on the order of creative work and the laws of nature. . . . . We do not hesitate to enforce the servitude for support, whether subjacent or adjacent, or to regulate the extent and manner in which it shall be rendered and enjoyed.

Instance of the enforcement of this servitude for support in adjacent estates are numerous in the books. For one, see *Wier & Bell's Appeal*, 81 Pa. 203.

Numerous cases in the books show that preliminary injunction to restrain removal of the pillars under substantially similar facts have been frequently granted in this commonwealth; and *Coagan* v. *Sheaffer*, at No. 3 Feb. T. 1878, Schuylkill county; *Nelson et al.* v. *Hock & Co.*, 14 Philadelphia 655-657; *Scheafer's Appeal*, 100 Pa. 379, and *Heckscher et al.* v. *Sheaffer et al.*, 14th Atl. Rep. 53, apparently related cases, though not passing upon the right to perpetual injunction, clearly indicate the plaintiff's right and the court's duty.

In *Coagan* v. *Sheaffer* preliminary injunction was awarded. No report of the action of the Supreme Court on the case has been cited or found, though in *Nelson et al.* v. *Hock & Co.*, in a hearing on motion to disolve an injunction, Walker, J., says (p. 657): "In Coagan v. Sheaffer et al. (a case similar to the present one) where this court restained the defendants from mining and removing coal beneath a lot of complainant, the Supreme Court sustained the injunction." But Judge Pershing, in Heckscher et al. v. Scheaffer et al., though he quotes nearly the whole of the opinion of Judge Walker, omits the above paragraph and substitutes asterisks therefor. If the Supreme Court heard the Coagan case at all, it is probable it refused to vacate the preliminary injunction, as was done in Sheaffer's Appeal, 100 Pa.

In Sheaffer's Appeal the Supreme Court twice (pgs. 380 and 382) refuses to interfere with the preliminary injunction, on the dates May 1st and May 15th, 1882. When presented to the court the second time the application for re-argument was reinforced by an elaborate statement of "reasons," among others, that the appellant's plant had cost over $300,000; that the Messrs. Heckscher had already suffered damage to more than $50,000 by reason of the preliminary injunction; that the utmost loss to one of the appellees (Conville) is not more than $1,500; that the damage is capable of exact pecuniary estimate; that defendants are amply able to pay the damages, if liable, etc.

The preliminary injunction was yet in force, or as Judge Pershing says, "That case still remains in this position" when Heckscher et al. v. Scheaffer et al. was tried. It was an action of covenant by the mine operators, lessees, against their lessors. After leasing the coal to plaintiffs, the defendants had sold and conveyed lots off the surface to different persons, who restrained the mine operators. By the injunction the lessees were cut off from 100,000 tons of coal. At later time the defendants re-purchased the lots and authorized plaintiffs to mine out the breast pillars. In the meantime timbers and supports had rotted, and plaintiffs were able to recover but 12,000 tons of the coal.

On the trial and offer by plaintiffs' counsel to prove the amount of coal thus lost, and that it would have netted the plaintiffs $100,000 profit if they had not been restrained from mining it, was overruled. On appeal the Supreme Court say: "The offers of evidence in this case were properly refused," and refer to "the fact that surface support is not only a legal duty but a natural right," etc. It is apparent, however, that there were several objections to these offers, and the Supreme Court sustained the ruling "without reference to the fact" that surface support is a legal duty, etc.

Notwithstanding this does not clear up the question now under consideration, it furnished light upon it, as I view these related cases.

If support is part of the plaintiff's reserved estate, and if he has "an absolute right to have his surface supported precisely as it was in its natural state" (*Pringle* v. *Vesta Coal Co.*, 172 Pa. 438), it follows that no one may take this reserved estate from him, or without his consent, change the surface from its natural estate.

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The defendants, the Wilmore Coal Company, bought, and the Berwind-White Coal Mining Company leased the coal with full knowledge of, and in subordination to, the servitude owed to the plaintiff's surface. That large profits would be made by them if not restrained from mining out the standing ribs, and that the money measure damage to the plaintiff by such mining will be a much less sum than defendants gain, is true, but this cannot operate to prevent the plaintiff from maintaining his surface intact. If there be heavy loss to defendants, it is not a result of the operation of the law alone, but of the contracts made with presumed knowledge of the law. "And as to the principle invoked that a chancellor will refuse to enjoin when greater injury will result from granting than from refusing an injunction. It is enough to observe that it has no application where acts complained of is in itself, as well as in its incidents, tortuous. In such case it cannot be said that injury would result from the injunction, for no man can complain that he is injured by being prevented from doing to the hurt of another that which he has no right to do. Nor can it make the slightest difference that the plaintiff's property is of insignificant value to him, as compared with the advantages that would accrue to the defendants from its occupation." *Walters* v. *McElroy et al.*, 151 Pa. 557-558; *Sulllvan* v. *Steel Company*, 208 Pa. 551-555. In the latter case Mr. Justice Brown, after quoting approvingly the above language of Mr. Justice Heydrick in *Walters* v. *McElroy et al.*, says, "There can be no balancing of conveniences, when such balancing involves the preservation of an established right, etc."

This matter of balancing of conveniences is pressed by defendants counsel under the equity rule that injunction is a matter of grace and not of right, and where more injury will result from awarding than refusing it, it should be refused. But as above shown the principle has no application when the act complained of is tortious and without right.

Besides, whatever may have been the power of the chancellor in early days in the administration of equity in England, the modern chancellor's grace is hedged about by well known rules and is never the arbitrary exercise of favor.

"A chancellor does acts of grace, but that grace sometimes becomes a matter of right to the suitor of the court, and when it is clear that the law cannot give protection and relief, the chancellor can no more withhold his grace than the law can deny protection and relief, if liable to give them." *Sullivan* v. *Steel Company*, *Walters* v. *McElroy*, *et al.*, ibid.

I am of opinion that the injury to the plaintiff which will result to his estate in this farm from the removal of the pillars yet standing will be irreparable, as that term is defined by the authorities in the law, and that by reason of the continuous trepass that must result in the removal of the support, the permanent injury to the estate, the multiplicity of suits that may be necessary if compensation in damages were sought, the law does not furnish the plaintiff an adequate remedy, and that therefore injunction is his appropriate and only effective remedy. Without it, he must suffer a change in the surface and face of his farm against his will, and without his fault, and his reserved estate in the support and his legal right of support of his surface are absolute nothings.

And now, January 14th, this cause came on to be heard at this time, and was argued by counsel, and upon consideration thereof, it is ordered, adjudged and decreed as follows, viz: That the defendants, their agents, employees, servants and other persons do henceforth perpetually desist from mining and removing, causing to be or permitting to be mined and removed the coal yet remaining in place as pillars under so much of the plaintiff's farm described in the bill filed in this case, as such pillars yet remain as aforesaid, in any manner that will cause subsidence or breaking of the surface of plaintiff's land, or that will result in damages present or future to the surface; conditioned, however, that the coal in said pillars may be mined and removed if immediately upon the removal of any pillars or part of pillars, the removal of which will endanger subsidence of or injury to the surface, sufficient support of stone or other permanent material be substituted to furnish complete support to the surface against subsidence and injury; that so much of the

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preliminary injunction as relates to the displacement of a limestone stratum, and as required defendants to provide or rendered insecure the surface by mining operations at the time the preliminary injunction was granted, is dissolved. Defendants to pay the costs of this proceeding. Decree to be entered by the prothonotary, *nisi*.

For plaintiff, *John E. Gasteiger*, *Alexander King* and *Hay & Hay*.

For defendant, *W. H. Rupple* and *David L. Krebs*.

CONSTITUTION OF PENNSYLVANIA. By Thomas Raeburn White. T. & J. W. Johnson & Co., Philadelphia, Pa., Publishers.

The greater part of this work was prepared while the author was assistant professor of law at the University of Pennsylvania, and was assigned to the duty of teaching constitutional law. The book presents a comprehensive discussion of the construction of the Constitution of Pennsylvania, as developed in our courts. In order to bring it within as small a compass as is consistent with an intelligent understanding of the subject, all cases have been excluded from consideration except those which tend to make clear the meaning of the Constitution. No. subject is treated generally save by way of necessary introduction to the consideration of some clause in the Constitution; the single purpose of the volume is to supply a convenient means of obtaining a comprehensive knowledge of our fundamental law. It is practically the only work on this subject, and will prove useful to the members of the bar. While the notes of cases are copious, and quotations from decisions are numerous, yet the greater part of the work is taken up with the author's language and opinions on the various questions. An excellent index at the end makes the contents of the work readily accessible.

In the case of Smith v. Township of Au Gres, 17 Am. B. R. 745, it has been held that the competency of a witness to testify in a court of bankruptcy as to a transaction between himself and a deceased person is to be tested by section 858 of the United States Revised Statutes, and not by the State statute.

Use of Streets by Building Contractors. A person sitting on a pile of building material placed in the street in front of a lot upon which a building was being constructed was injured by a splinter from a pile being driven in the foundation. In a suit for damages, the contracting company insisted that it was liable only for gross negligence, as in the exercise of its lawful right to place in the street building materials, the street had temporarily ceased to be subject to use by the public, and that persons on that part of the street occupied by the building materials were trespassers. The Supreme Court of Wisconsin states that the right of a lot owner to encumber an adjoining street does not transpose the street into private property. It is only one of the lawful uses of the space, and must be made in deference to the rights of others to also make all lawfull use thereof. By way of illustration the court says that the presence of a vehicle in the street, while entirely lawful, is not exclusive of the right of another party there, nor does the lawfulness of such use absolve the owner from the duty of due care towards others. The case is Compty v. Starke, Dredge & Dock Co., 109 Northwestern Reporter, 650.

It has been held, in Mueller v. Goerlitz, 17 Am. B. R. 687, that the recording of an assignment of a mortgage is not constructive notice thereof to the mortgagor; and, where a bankrupt, having no actual notice that a mortgage given by him had been assigned, schedules the original mortgagee as the creditor, the bankrupt's discharge is no defense to an action upon the accompanying bond.

One who purchases, in the name of his partner, a seat in a stock exchange, is held, in Zell v. Baltimore Stock Exchange (Md.) 4 L. R. A. (N. S.) 435, to have, notwithstanding knowledge on the part of the officers of the exchange of the facts, no equity to prevent the enforcement of a rule of the exchange that a seat may be sold for the debts of the member holding it in favor of other members.

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PITTSBURGH, PA., JUNE 19, 1907.

NOTICE.

ERADICATA: Owing to the imperfect copy from the original opinion in BERKEY V. BERWIND-WHITE COAL MINING COMPANY, published in No. 48, June 12, 1907, of this paper, we note the following corrections:

Page 422, fact 12, second line, change *not* to read *now*.

Page 423, first column, eleventh line from bottom, after the word *support*, insert *and cannot remove it without leaving a sufficient amount to support the surface.*

Page 423, second column, 25th line from top, change *out* to read *but*.

Page 424, second column, 29th line from top, change *and* to read *an*. Same page, 10th line from bottom, change *furnished* to *furnishes*. Same page, last word, change *estate* to *state*.

Page 425, first column, 20th line, change *acts* to *the act*. Same page, second column first line, change *acts* to *act*, and seventh line, *liable* to *able*.

Page 426, third line, after provide, insert *permanent support to the surface where they had endangered.*

Court of Common Pleas No. 1,

ALLEGHENY COUNTY.

WRIGHT v. THE PHILADELPHIA COMPANY.

Gas companies—Rules and regulations—Reasonable—Advance payments as security.

A corporation supplying gas to the public has the right to make reasonable rules and regulations for the use of gas and the payment of its bills.

It has the right to require a reasonable deposit to secure the payment of its monthly bills.

The requiring of a deposit of $20 where the monthly bills average only $5 and the gas may be shut off within 10 days if the bill is not paid, is unreasonable.

No. 346 March Term, 1906.

Opinion by MILLER, J., specially presiding. Filed December 6, 1906.

The question is, the reasonableness of the right to require from the consumer of gas an advance payment as security, such reservation being contained in the contract which the consumer has executed.

FINDING OF FACTS.

1. On September 29, 1903 a contract was entered into between the plaintiff and the defendant by which the latter agreed to furnish natural gas at No. 5410 Bossart street, in the city of Pittsburgh. The same to be paid monthly in accordance with certain rules and regulations made part of said contract, one of which is as follows: "The company further reserves the right to require an advance payment or an increase in such advance payment, upon which no interest will be paid, for gas to be delivered and other services to be rendered, which payment will be refunded when the delivery of gas has been discontinued, and upon the payment of all bills due the company and surrender of the receipt therefor." Also the following rule: "The contract shall at the option of this company cease and terminate, and all claims for gas previously delivered shall become forthwith due and payable without notice from said company in case writs of execution are issued against the applicant; in case the premises described or referred to in the application as the place at which gas is to be delivered are levied upon under execution; in case personal property thereon is levied upon under execution; or in case of an assignment or other act of bankruptcy of the consumer;" with the further proviso that upon failure on the part of the consumer to comply with the foregoing and other rules or his removal from the premises, for nonpayment of any bill then due, the company may thereupon, without notice, shut off the gas, etc.

2. At the time the contract was entered into the plaintiff owned property at No. 2550 Wadsworth street, in the city of Pittsburgh, which was afterwards levied upon and sold at sheriff's sale. This fact, with information that the plaintiff's financial rating was not high, coupled with the additional fact that he was delinquent in payment of gas bills for the months of July, August and September, 1905, and that the company had an alleged claim against him for gas used in some other premises which they were seeking to collect, induced the company on November 23, 1905, to notify him in writing of the condition of his contract, calling for an advance payment as security, and demanding such an advance payment of twenty dollars within thirty

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days from that date, otherwise his supply of gas would be shut off.

3. After this notice, and prior to the 23d of November, two employes of the defendant company at different times verbally notified the plaintiff or his wife that the gas would be shut off unless the advance payment would be made within the time stipulated.

4. No advance payment being made in accordance with the notice received, the company, on January 4, 1906, shut off the gas from the plaintiff's premises.

5. The maximum gas bill for any one month was $8, the minimum $2, the average of plaintiff's bill for a year was between $5 and $6 per month. At the time the notice was sent to the plaintiff and at the time the gas was shut off he was not indebted to the defendant company on any gas bill rendered to him.

6. It appears from the receipted bills offered in evidence that each bill was for the consumption of gas about one month previous to the date of the reading of the meter, that payment was required within ten or twelve days thereafter in each case and discount was allowed, otherwise the gas might be shut off without further notice.

7. At the time demand was made on the plaintiff for the advanced payment of twenty dollars there was an alleged claim due from him to the defendant company, or some affiliated company, which claim the defendant's representatives insisted that they would collect.

8. The basis for the amount of deposit as testified to by the defendant company's representative was that the security demanded should be sufficient to cover two months' delinquency of a maximum gas bill taken in the winter time.

9. The company does not follow a uniform rule in demanding deposits from customers who are not property holders and whose financial standing is not satisfactory to them or who are not able to furnish some other form of security. The fact is found that in the case of another patron under these conditions a deposit or an advance payment of ten dollars was required.

CONCLUSIONS OF LAW.

1. The defendant company's rule reserving the right to require advance payment, or deposit, is reasonable and necessary to protect it from loss, and the defendant having agreed thereto cannot now refuse to make a reasonable advanced payment in accordance therewith.

2. Such deposit must be solely as security for the payment of gas consumed in the premises contracted for after the date of the deposit.

3. The amount of deposit demanded in this case is excessive and unreasonable.

4. A decree nisi in conformity with these conclusions will be entered. The costs to be paid by the defendant.

OPINION.

Plaintiff's ownership of property at the time the contract was entered into was, in the judgment of the company, sufficient to cause it to waive the requirement of an advanced payment.

But the changed conditions justified an enforcement of the rule which the company has the undoubted right to make for its own protection, and to which plaintiff had agreed.

In *Williams* v. *Mutual Gas Co.*, 52 Mich. 499, where a consumer used sixty dollars worth of gas a week, the bill being paid monthly or weekly, the court held that $100 as advanced payment was reasonable, and that the company had the right to govern its action by reasonable rules and to demand security or a deposit of money for that purpose. The same doctrine is in *Sheppard* v. *Milwaukee Gas Light Company*, 6 Wis. 526, in which it was held that the right to demand security for gas consumed, or a deposit of money to secure payment thereof, is just and necessary to guard against loss; this for the reason that the delivery of the gas is its consumption, and that it would be unreasonable to compel the company to furnish gas without reasonable security for the payment in convenient amounts and at convenient times. In *Foster* v. *Philadelphia Gas Company*, 12 Phila. 511, Judge Taylor lays down the rule that gas companies have the right to adopt and enforce just and reasonable regulations with regard to the use and treatment of their gas meters. That is not the exact question here; but if the rule applies as to the use

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and treatment of that class of personal property, why less reasonable is the rule to protect the company from loss where its property is actually consumed?

But no deposit can be demanded because of failure to collect some other gas debt or individual indebtedness due some affiliated company. This contract related only to future delinquencies at the place mentioned therein: *Lloyd* v. *Washington Gas Light Co.*, 1 Mackey, D. C. 331; *Gas Light Co.* v. *Colliday*, 25 Md. 1.

The right to adopt a rule that an advanced payment shall be made does not justify an unreasonable or excessive demand. The sole purpose of requiring a deposit is reasonable security for each preceding month's bill. Where, as here, the average amount of gas for the year used exceeded slightly the sum of five dollars per month, and where the maximum bill in the winter months was eight dollars, and where all that possibly could be due, unless the company did not enforce its own rule, was the amount of the preceding month's bill, plus such an amount of gas consumed during the existing ten or eleven days until the time fixed for shutting off the gas, a deposit of twenty dollars is more than the conditions reasonably warrant. This is true even on defendant's theory that the amount of deposit should be double the amount of any month's maximum bill.

The apparent motive for demanding this excessive deposit on the part of the company was to enforce payment of some other account. This, as has been said before, is not within its power. All it has a right to demand is such a deposit as will reasonably protect it for a previous month's bill. The demand in this case is wholly out of proportion to the necessities for fair protection. *Fowler* v. *Chartered Gas Co.*, 17 Gas Journal 908; *Halfhied* v. *Worthington Gas Co.*, 22 Gas Journal 328.

No conclusion of law is stated touching the provision in the rule that interest shall not be allowed on advance payments. If the plaintiff had not signed the contract agreeing his deposit should not bear interest, and if any evidence or authority had been cited by him showing the unreasonableness of this provision in the rule, it would have received very careful consideration. Just why this change has been made, when it appears that at No. 303 February Term, 1892, in the Court of Common Pleas No. 3 of this county, in the case of *Stevenson* v. *Philadelphia Co.*, the payment of interest on deposits was conceded, is not at all clear. The burden was upon the plantiff to show the unreasonableness of this provision. In the absence of anything by him to sustain it, no opinion is expressed concerning the same.

The case of *Bailey* v. *Gas Co.*, 193 Pa. 175, relied upon by the plaintiff, does not sustain his contention that the company does not have the right to make rules and regulations for its protection as well as for the protection of the public. The sole question decided there was the right of the company to charge different rates for its product when used as fuel or for illuminating purposes. That case does not prevent this company from securing itself against loss in different methods, and does not necessarily work a discrimination between its patrons; but its rules must treat customers of the same class with equality, and when it is obliged to resort to the demand for advance payments it cannot discriminate between those who use comparatively the same amount of gas by imposing an unequal burden. It may be conceded that the charter of the company does not explicitly in terms authorize it to adopt a rule providing for advance payments as security for the consumption of gas, but that such rules and regulations, if reasonable, are among the necessary incidents arising from its charter rights and duties, is manifest.

For plaintiff, *J. A. Wakefield.*

For defendant, *Reed, Smith, Shaw & Beal.*

Court of Common Pleas No. 2,

ALLEGHENY COUNTY.

BISI et al. v. HORN et al.

Real estate—Agreement of sale—Agent—Ratification by principal—Damages.

Where an agent contracts to sell property, the purchaser being informed that the contract must be ratified by one of the owners and the owner

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later refuses to ratify, the purchaser cannot recover expenses incurred in examination of title and so forth. He incurred these expenses at his own risk.

No. 309 April Term, 1906.

Opinion by FRAZER P. J. Filed March 7, 1907.

The purpose of this bill was to compel specific performance of an agreement for the sale of real estate. An injunction was asked to prevent defendants from conveying the property to others. The bill also contained a prayer for general relief. From the bill, answers and proofs we find the following facts:

FINDINGS OF FACT.

1. Sarah Levy and Jacob Horn are now and for some time past have been the owners in fee as tenants in common of a lot of ground situated in the Sixth ward of the city of Pittsburgh, having a frontage of 20 feet on Second avenue and a depth of about 79 feet, the property being fully described in plaintiff's bill.

2. Jacob I. Levy, the husband of Sarah Levy, represented to his co-defendant, the Aronson Realty Company, which company is a corporation duly organized for the purpose of transacting a general real estate business, that he was the owner of the property described in the preceding paragraph, and in writing signed by himself individually constituted that company his sole agent for the period of four months to make sale of the property at the price or sum of $7,000, a copy of the writing signed by Levy being attached to the separate answer of the Aronson Realty Co. and marked exhibit A.

3. On January 8, 1906, the Aronson Realty Company, in its own name, by agreement in writing agreed to sell and convey to Bisi and Caprini, the plaintiffs, the the property placed in their hands for sale by Jacob I. Levy, for the price or sum of $7,500, and received from plaintiff the sum of $250 on account of the purchase money, a copy of that agreement being made part of plaintiffs' bill, and marked exhibit A.

4. Shortly before entering into the agreement above referred to with Bisi and Caprini, the Aronson Realty Company learned that the property did not belong to Jacob Levy, but was owned by his wife and her brother, Jacob Horn, as tenants in common, and at the same time learned that Mr. Horn was living in Denver, Colorado. Upon being advised of the contemplated sale of the property to Bisi and Caprini, Horn telegraphed his attorney in this city, L. S. Levin, Esq., as follows: "Give you power of attorney, act for me, take care of my interest." On receipt of this telegram, Mr. Levin advised the Aronson Realty Company that he could not act under it, and that the agreement must be sent to Mr. Horn for his signature.

5. Mr. Caprini, who acted for himself and his co-plaintiff, was shown the telegram referred to in the previous paragraph before the agreement to purchase referred to in paragraph three was executed, and informed by the manager of the Aronson Realty Company that it was their power to sell the interest of Horn in the property. At the time of executing that agreement, another agreement was prepared and sent to Horn at Denver for his signature. On January 26, 1906, Horn telegraphed the Aronson Realty Company from Denver as follows: "Have not signed agreement and do not intend to." Upon receipt of that telegram, the manager of the Aronson Realty Company immediately took it to the office of plaintiffs, exhibited it to them and tendered them the Aronson Realty Company's check for $250, the amount paid on account of the purchase money, which plaintiffs refused to accept.

6. In the agreement mailed to Mr. Horn by the Aronson Realty Company for his signature, the consideration to be paid by plaintiffs for the property in controversy was stated at $7,000, instead of $7,500, the price agreed upon.

7. Since the execution of the agreement of January 8, 1906, by the Aronson Realty Company with plaintiffs, Mrs. Levy and Horn have contracted to sell the property to another person for the sum of $8,000.

8. At the trial, plaintiffs admitted they were not entitled to specific performance under the testimony, but asked damages from defendants as follows: $250, the amount of hand money paid by them, $150 for examination of title to property, and $125 for attorney's fees in these proceedings, in all, $525.

CONCLUSIONS OF LAW.

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1. The sole question here is the amount of damages plaintiffs are entitled to receive. That they should receive back the hand money paid by them is clear. We have not been convinced, however, that they should recover any greater sum. At the time the agreement was signed, plaintiffs knew that Horn had an interest in the property; they also saw his telegram to Mr. Levine, and were informed by the representative of the Aronson Realty Company that the telegram was their authority to make sale of Horn's interest. The testimony does not show any attempt to mislead plaintiffs or keep from them any information in regard to Horn. That this was the case is indicated by the understanding between the parties that a copy of the agreement should be mailed Horn at Denver for his signature. Under these circumstances, we think the expense of examining the title was incurred at plaintiff's risk and cannot be recovered here. Neither can plaintiffs recover attorneys fees incurred in instituting and carrying on these proceedings, especially because a tender back of the hand money was made before the bill was filed, and refused by them.

2. In accordance with the foregoing, plaintiffs are not entitled to specific performance, but should have judgment in their favor against defendant, the Aronson Realty Company, for $250. The costs of these proceedings should be divided equally between the Aronson Realty Company and Jacob I. Levy.

Let a decree be drawn accordingly.

For plaintiffs, *Robt. T. McElroy* and *Frank J. Logario.*

For defendants, *Aronson & Aronson, L. K. & S. G. Porter, Sachs & Hirshfield* and *L. S. Levin.*

(Common Pleas No. 2, Allegheny Co.)

LANG v. CITY OF ALLEGHENY.

Municipalities—Special counsel—Authority to employ.

A city of the second class has the right to employ assistant counsel to assist the city solicitor in special matters in which the city is interested.

No. 1109 January Term, 1907.

Opinion by FRAZER, P. J. Filed January 29, 1907.

The purpose of this bill was to restrain the defendants, Charles F. Kirschler and James Brown, as mayor and comptroller, respectively, of the city of Allegheny, from issuing a warrant to Harvey Henderson and William C. Gill for services rendered as special counsel for the defendant city. From the bill, answers and proofs, we find the following facts.

FINDINGS OF FACT.

1. Plaintiff is a resident and taxpayer of the city of Allegheny, which municipality is a city of the third class, duly incorporated and existing under the laws of this commonwealth. Charles F. Kirschler is the mayor of the city and James Brown its comptroller, both of whom were duly elected and are legally serving as such officers.

2. At No. 71 December Sessions, 1905, of the Court of Quarter Sessions of this county, proceedings were instituted under the provisions of an act of assembly, entitled "An act to enable cities that are now or may hereafter be contiguous or in close proximity to be united, with any intervening land other than boroughs, into one municipality; providing for the consequences of such consolidation, the temporary government of the consolidated city, payment of the indebtedness of each of the united territories and the enforcement of debts and claims due to and from each," approved February 22, 1906, for the consolidation of the cities of Pittsburgh and Allegheny, and in accordance with such proceeding and the provisions of the act referred to, an election was held in the cities named and a majority of 20,151 recorded in favor of such consolidation.

3. To the order of the Court of Quarter Sessions for an election, referred to in the preceding finding, and the proceedings had thereunder, certain citizens of the city of Allegheny filed exceptions, which exceptions, after argument and upon consideration, were overruled by the Court Quarter Sessions, from which order an appeal was taken by exceptants to the Superior Court. During the pendency of the appeal in that court, an order was made by that court permitting the city of Allegheny to intervene and become a party thereto.

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4. Subsequent to the order permitting the city of Allegheny to intervene, its councils, by resolution duly passed, authorized the mayor and city solicitor of the municipality to employ counsel to act in conjunction with the city solicitor in taking the necessary legal action to prevent the annexation of the city of Allegheny to and with the city of Pittsburgh, and appropriated the sum of $2,500 or so much thereof as may be necessary to be used for the payment of counsel so employed.

5. In pursuance of the provisions of the ordinance referred to in the preceding paragraph, Charles F. Kirschler, mayor, and Elliot Rodgers, city solicitor of the city of Allegheny, on September 25, 1906, appointed Harvey Henderson and William C. Gill as special counsel to act in conjunction with the city solicitor in the appeal then pending in the Superior Court to have annulled and set aside the proceedings for the consolidation of the two cities begun in the Court of Quarter Sessions of this county.

6. At the time of the passage of the ordinance authorizing the employment of special counsel and the appointment of the attorneys named in the preceding paragraph, the contingent fund of the city of Allegheny, which is the fund from which the services of special counsel must be paid, was without funds, and thereupon by ordinance duly passed and approved the sum of $2,500 was transferred from the bureau of water appropriation to the contingent fund.

7. The mayor and comptroller were about to issue a warrant to Messrs. Henderson and Gill for the sum of $2,500 as compensation for services rendered and to be rendered by them in the proceedings referred to, when this bill was filed, asking that the officers named be enjoined from taking such action.

8. Messrs. Henderson and Gill are members of the bar of this county, and the sum proposed to be paid them is not unreasonable or excessive compensation for the services rendered by them under their appointment.

CONCLUSIONS OF LAW.

1. The sole question here, is the right of the city of Allegheny to employ special counsel to assist its city solicitor in particular cases. That it has such right, we have not the least doubt. The act of June 20, 1901, P. L. 589, amending an act entitled "An act for the government of cities of the second class," etc., provides in article 9, section 1, clause 3, as follows: "No department of the city shall employ any other solicitor, but assistant counsel may be employed in any particular matter or cause by the city recorder, with the consent of councils, but he shall be selected by the city solicitor. In this case Messrs Henderson and Gill were employed and selected by the mayor and city solicitor with the consent of councils, and have rendered sevices to the city in both the Superior and Supreme Courts under their employment. They are, therefore, entitled to receive compensation for their services. The amount proposed to be paid them is not, in our opinion, unreasonable, considering the nature and importance of the litigation in which they have assisted the city solicitor. The employment being legal, the services having been rendered and the compensation proposed not being excessive, the injunction should be refused and the bill dismissed.

2. Let a decree be drawn dismissing the bill at plaintiff's costs.

For plaintiff, *Jackson* and *Lang*.

For defendant, *Lee C. Beatty*.

Court of Common Pleas,

CRAWFORD COUNTY.

VAN WERT NATIONAL BANK v. M. ELLIS CO.

Banks and banking—Check—Demand for payment.

Where a check has been presented to the bank upon which it is drawn for payment and payment refused, suit may be brought by the holder against the maker, after notice of dishoner, without any previous presentation of the check to him for payment.

Where a check has been dishonored and the maker has promised to pay the same, it is not necessary for the holder to show either presentment or notice.

No. 78 May Term, 1906. Sur rule for judgment for want of sufficient affidavit of defense.

Opinion by THOMAS, P. J. Filed November 12, 1906.

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This is an action brought by the plaintiff (who was not an original party to the instrument) upon a check drawn by defendants upon the Crawford County Trust Co. in in favor of Balyeat & Conn.

The statement avers an endorsement in due course by the payees to plaintiff, a presentation for payment of the same to the said trust company and a refusal of payment by said trust company, that defendants "had notice" of said refusal to pay, and that on same day defendants "in consideration thereof promised to pay the plaintiff the said sum of money in said check or order specified, together with costs of protest and interest."

The sole matter set up in the affidavit of defense is that "The plaintiff never made presentment of the check upon which suit is brought to defendants, or either of them."

Was such presentation necessary? It is true that the court seems so to say in *Bank* v. *Kopitzsch Co.*, 161 Pa. 134, although that seems to be a dictum. The court says: "It was necessary therefore that the statement should contain some averment of presentment to the drawer and a neglect or refusal to pay on his part."

We have wondered if there might not be a typographical error here and the word "drawer" should not be "drawee," for certainly we do not understand it to be either the law or a business custom to present a check for payment to the maker or drawer, but rather to the drawee.

If this be not an explanation of that sentence, the presentation there referred to must certainly have referred to notice of dishonor, and refusal of drawee to pay.

It seems to be well settled law prior to the act of May 16, 1901, P. L. 194, that the duty of the holder of a check was to duly present the same to the drawee for payment, and if refusal thereof was made to give prompt notice to the drawer of such dishonor. *Case* v. *Morris*, 31 Pa. 100; *Levy* v. *Peters et al.*, 9 S. & R. 125.

It is true that plaintiff's averment as to the giving of notice of dishonor is not specific and precise enough to make out a case requiring an affidavit of defense at all, as the averment with reference thereto is a conclusion of law rather than a statement of facts from which the conclusion may be drawn. *Caven-Williamson Co., Inc.*, v. *Ice Co.*, 27 Sup. Ct. 381; *Peale* v. *Addicks*, 174 Pa. 543. And were there nothing to cure this failure to properly aver notice of dishonor, plaintiff would be in no position to require an affidavit of defense, but there is an averment of a promise to pay on the part of defendants after the dishonor of the check. We are persuaded that the averment of notice of said dishonor is unnecessary, as the promise to pay raises the presumption of knowledge of dishonor.

In the case of *Levy* v. *Peters et al.*, 9 S. & R. 125, the court says: "Whenever the drawer acknowledges himself to be liable to payment, the necessity of proving a demand of the drawee, and his refusal to pay, and notice to the drawer, is dispensed with."

In *Oxnard* v. *Varnum*, 111 P. S. 193, the court says: "The general principle seems now to be settled in this country that where no demand has been made or notice given, a promise to pay after maturity, with a full knowledge of the laches, is binding. . . . A promise to pay will entirely dispense with proof of presentation or notice, and will throw on the defendant the double burden of proving laches and that he was ignorant of it."

In *Loose* v. *Loose*, 36 P. S. 538, the syllabus on this subject is as follows: "An acknowledgment of liability and a promise to pay, made by an endorser, after default of payment by the maker, dispenses with proof of presentment and notice, and throws on the defendant the double burden of proving laches, and that he was ignorant of it.

"Such a promise and acknowledgment raise a presumption that the endorser knew of the dishonor of the note; and if there be evidence to the contrary, it is a question for the jury, whether the presumptive knowledge arising from the promise has been rebutted by the defendant."

It is true some of these decisions refer to endorsers of promissory notes, but in our opinion the same are authority as to makers of checks under our act of 1901. By said act, section 185, a check is a bill of exchange drawn on a bank and payable on demand.

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By section 70 of said act, presentment is not always necessary to charge a party primarily liable, and by section 82 is dispensed with, "3. By waiver of presentment, express or implied." No provision is here made for presentment to a maker.

Section 89 provides for the giving of notice to the drawer or endorsers of the dishonor of such instruments, and section 109 provides, "Notice of dishonor may be waived, either before the time of giving notice has arrived or after the omission to give due notice, and the waiver may be express or implied."

In this case there is an averment of presentation to the drawee and refusal to pay. No denial is made of this and therefore the waiver thereof is not necessary. There is no averment of a presentation to the drawers or makers and no proper or sufficient averment of notice of dishonor to them. There is a denial of a presentment to the makers, but in our opinion such a presentment, if made for payment, is unnecessary and could only avail for the purpose of giving notice of dishonor, which notice, as well as presentment, was impliedly waived by the promise to pay same, which is averred and not denied.

It therefore follows that no available defense has been set up as to said promise, and the rule is hereby made absolute.

For plaintiff, *Thomas Roddy.*

For defendant, *Geo. F. Davenport.*

[From J. D. Roberts, Esq., Meadville, Pa.]

INFANTS. (CONTRACTS—FALSE REPRESENTATIONS AS TO AGE—ESTOPPEL.) MISS. SUP. CT.

The case of Commander v. Brazil, 41 So. 497, adds another authority to those which go practically to the extent of holding an infant bound by his contracts under certain circumstances. The defendant in this case, while an infant, but after his stature and appearance indicated that he had reached years of maturity, purchased a livery business, and to secure a portion of the purchase price executed deeds of trust covering the property, also a tract of land. During the transaction he stated several times, in answer to direct questions, that he was twenty-one years of age, and the seller executed the contract believing and relying on those statements. In dealing with the question whether defendant was entitled to avoid the contract and prevent the enforcement of the deeds of trust the court says that practically all the authorities recognize the right of the matter, inasmuch as while holding that a minor cannot be sued on his contract, they nevertheless hold that he is liable for his tort, and can be sued for damages for his false representations. Other authorities lay down the rule that he may not be sued at law but may be sued in equity. The court then suggests that if a minor is to be made liable for his fraud and his property taken to compensate in damages a person who has suffered by the minor's deceit, it is difficult to understand how it can be made any easier on the minor for this to be done through an action of tort instead of on his contract, if the same results follow. And so, limiting its holdings somewhat closely to the facts of the case, the court declares that when a minor has reached the stage of maturity, which indicates that he is of full age, and enters into a contract falsely representing himself to be of age, accepting the benefits of the contract, he will be estopped to deny that he is of full age when the obligation of the contract is sought to be inforced against him.—*The Green Bag.*

MATTHEW BENDER & COMPANY, Albany, N. Y., announce that the first impression of the new sixth edition of Collier on Bankruptcy that was published May 4, 1907, was sold at once and that the second printing is now ready for delivery.

JURISDICTION OVER RECEIVER'S SALE OF ASSETS. The U. S. Circuit Court of Appeals has held, in Mason v. Wolkowich, 17 Am. B. R. 709, that where a receiver in bankruptcy, by order of court, makes a sale of assests of a bankrupt estate, in his possession, all parties concerned in the sale are bound to recognize him as an officer of the court and the court may enforce in a summary manner the completion of the contract of sale, and the parties involved will be deemed to have consented to such proceeding.

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PITTSBURGH, PA., JUNE 26, 1907.

Court of Common Pleas No. 2,

ALLEGHENY COUNTY.

COLE v. SULZNER.

Equity—Testimony—Burden of proof.

Where the testimony in an equity suit is that of the parties alone, each being equally credible, the bill will be dismissed, the answer being responsive to the bill.

No. 46 October Terms, 1906.

Opinion by SHAFER, J. Filed February 6, 1907.

The bill is for an injunction to restrain the defendant from disposing of certain shares of stock, for the transfer to the plaintiff by the defendant of the stock in question, or an account of the proceeds of the sale thereof.

FINDINGS OF FACT.

1. In June, 1905, plaintiff was the owner of five thousand shares of the par value of one dollar each in the Gold Bullion Mining & Developing Company, a corporation of Arizona, which were pledged to that company as security for a note of $178.18 made by the plaintiff to the company.

2. At that time and until March, 1906, the defendant was the president of the company above mentioned. On or before June 15, 1905, the note in question was overdue and the defendant, as president of the company, demanded payment thereof. The plaintiff thereupon told the defendant that he could not pay unless he could sell the stock. The defendant told the plaintiff that he believed he could sell the stock for the price of twenty-five cents a share, and it was agreed that the defendant should sell the same at twenty-five cents a share, should receive a commission for the sale of $250, should pay out of the sale the note and interest owing to the company, and deliver the balance of the proceeds to the plaintiff. This was reduced to writing and is printed as exhibit A of the bill. Whether it was actually signed by the defendant on the 15th of June or the 16th is disputed between the parties and is, perhaps, not material.

3. On June 16, 1905, the plaintiff turned over the stock in question to the defendant and received from him a check for $817.32, and at the same time the plaintiff gave to the defendant his check for $50. The defendant still has a part of the stock and has sold a part of the same for fifty cents a share.

4. The dispute between the parties upon which the whole case turns, is as to the facts of the transaction of the turning over of the stock to the defendant and the payment by him to the plaintiff of $817.32. The plaintiff's allegation is that after having employed the defendant to sell his stock at twenty-five cents a share upon a commission of $250, as shown by exhibit A, the defendant told him, the plaintiff, that the customer to whom he expected to sell the stock refused to pay twenty-five cents a share, but that he would pay twenty cents a share, and that the plaintiff thereupon authorized the defendant as his agent to sell the same for twenty cents a share, and that the defendant accounted to him for the five thousand shares at twenty cents a share, which amounts to $1,000, less the note and interest thereon, amounting to $182.68, leaving the amount of the check given by defendant to plaintiff, $817.32, and that the plaintiff thereupon drew his own check to the defendant for $50 as compensation for his services. The defendant denies that any such arrangement was made as to the reduction of the price, but alleges that on the 16th of June, before he was able to communicate with the person to whom he expected to sell these shares, the plaintiff persuaded him to buy them himself at twenty-five cents a share, according to the terms of the agreement, exhibit A, and that he, expecting afterwards to sell them to the customer that he had in mind, consented to purchase the stock at that price, and that he thereupon gave his check for $817.32, that being the balance after payment of the

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note to the company and payment to him of the $250 commission agreed upon, and that the plaintiff was so well pleased with his having the sale effected in that way that he gave the defendant $50 extra compensation; and the defendant further alleges that he was unable to sell the whole of the stock to the customer of whom he had spoken to the plaintiff, and was compelled to keep part thereof until a later period when he was able to sell it for fifty cents a share. There is practically no evidence to corroborate the account of either of the parties as to this matter. We are of opinion that the plaintiff has not shown by the weight of the evidence that his account of the matter is correct, and further that the answer of the defendant is responsive to the bill, and has not been overcome by the necessary amount of evidence. We are therefore unable to find as requested by the plaintiff that the defendant in any way cheated or defrauded the plaintiff in the matter of the sale of the stock.

CONCLUSION OF LAW.

Under the facts found, the plaintiff has no claim to an accounting or otherwise in regard to the stock in question, against the defendant. The bill must therefore be dismissed, costs to be paid by the plaintiff.

For plaintiff, *Chas. Marshal Johnston.*

For defendant, *Harvey A. Miller.*

(Common Pleas No. 2, Allegheny Co.)

LINN v. KNORR.

Real estate—Agreement of sale—Specific performance—Profits.

Where vendor in agreement for sale of real estate has sold part of the land before bill for specific performance is filed vendee is entitled to the profit on the sale.

No. 101 July Term, 1905.

[See former opinion in N. S. Vol. XXXVI, No. 50, page 325.]

Opinion by YOUNG, J. Filed February 28, 1907.

This cause came before us on exceptions to the findings of fact and conclusions of law and upon the additional evidence taken by direction of the court. We have carefully reviewed our former findings of fact and conclusions of law in the light of the exceptions and the additional evidence, and are still of the opinion that those findings are correct as to the main contention, but in the light of the new evidence we find the following additional facts and conclusions of law.

SUPPLEMENTAL FINDINGS OF FACT.

1. The bill in this case was filed April 15, 1905, and served on defendant April 17, 1905, but prior to the filing of the bill, namely on March 9, 1905, defendant agreed to sell 25 feet by 125 feet of the land in controversy, or one-fourth thereof, to one, C. C. Blair, for the sum of $1,625, of which $875 was cash, the vendee assuming $750 of the mortgage of $3,000 then on the entire piece of land, which agreement was subsequently performed by the defendant and wife giving their deed dated April 8, 1905, acknowledged April 15, 1905, and prior to the service on defendant of the bill or of the notice of an application for an injunction.

2. The sale by defendant to plaintiff was at the rate of $65 per front foot, or $2 per front foot more than the purchase price from Mrs. Spear, as shown by the second finding of fact, or the sum of $50 more than the purchase price.

3. Defendant paid the following sums upon the land since the conveyance to him by Mrs. Speer: street assessment, $142.64; interest on mortgage from March 8, 1905, to January 23, 1907, $253.03, total $395.67.

4. The plaintiff holds the certified check of defendant for $100, being the amount of hand money paid by plaintiff to defendant upon March 8, 1905.

The following additional conclusions of law are now found:

1. The defendant, having sold 25 feet by 125 feet of the land in controversy before the bringing of the bill, plaintiff is entitled to receive the profit made by the defendant on that sale, which is the sum of $2 per front foot for 25 feet, or $50.

2. The plaintiff is entitled to have a conveyance for the remaining 75 by 125 feet of the land described in the bill, on the payment by plaintiff to the defendant of the amount of the street assessment, $142.64, the interest paid by defendant on the mortgage, $253.03, and the balance of the pur-

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chase money for three-fourths of the land, namely $2,475, less the profit on the lot sold, $50, or the sum of $2,425, subject to three-fourths of the mortgage of $3,000 now on the land, or $2,250.

Let a decree be drawn accordingly.

For plaintiff, *John A. Wilson.*

For defendant, *Lawry & Grierson.*

Court of Common Pleas,

FAYETTE COUNTY.

SAULLES et al. v. PERCY MINING COMPANY.

Mining rights—Coal—Surface—Right to support—Injunction.

At the instance of the surface owner equity will enjoin the owner of the underlying strata of coal from removing all the coal so that no support remairs for the surface. The right to surface support will be enforced even though the owner of the surface is entitled to his damages in case the support is taken away by the owner of the coal. The surface owner can choose between damages for removal of the surface support or an injunction to restrain it from being removed.

No. 479. In Equity.

Opinion by UMBEL, J. Filed July 26, 1906.

FINDINGS OF FACT.

1. Caroline M. de Saulles died, intestate, September 24, 1905, and left surviving, Louis de Saulles, her husband; Ellen M., a daughter, intermarried with Edward C. McCullough; Louis de Saulles, Jr., a son, and Odile, a daughter, intermarried with Albert M. Hustead; the said Odile died March 4, 1904, and left surviving, her husband, making the plaintiffs herein all the heirs at law of the said Caroline M. de Saulles.

2. February 24, 1886, Robert Junk et ux. conveyed, by deed recorded in deed book 68, page 339, to the said Caroline M. de Saulles, all that certain tract of land situate on the headwaters of the Gist Run, in North Union township, Fayette county, Pa., bounded by lands of Percy Mining Company, Robert Hogsett, Everhart Shipley et al., containing eighty-eight acres and thirty-two perches, more or less, "excepting and reserving, however, so much of the coal in and underlying said messuage or tract of land as is embraced in the reservation, in deed of Thomas H. Frost and Laura, his wife, to Robert Junk . . . . dated the 27th day of February, A. D. 1877, and recorded in the recorder's office of Fayette county in deed book, volume 32, page 414."

The reservation in which said Frost deed being as follows, viz: "And further it is understood the said Frost hereby reserves all the coal in and under the following described bounds of the land hereby conveyed: viz: Beginning at a stone, the corner of land of Robert Hogsett (as first herein set forth), thence by said Hogsett's land S. 37° east, 58 perches; thence S. 33¼° west, 119.7 perches; thence N. 50¼° west, 63.16 perches; thence N. 36¾° east, 132.8 perches to the place of beginning. Containing 46 acres 137 perches, more or less; said coal to be for the use of the said Frost, his heirs and assigns."

Of which said premises conveyed as aforesaid Caroline M. de Saulles, died siezed and possessed.

3. By sheriff's deed, acknowledged March 6, 1879, recorded in the prothonotary's office in sheriff's deed docket No. 2, page 94, the said reserved coal was conveyed to George C. Matshall, and by deed of the said George C. Marshall et ux., dated January 21, 1887, recorded in deed book 70, page 248, was conveyed to the Percy Mining Company, the defendant, a corporation created and existing under the laws of the Commonwealth of Pennsylvania, for the purpose of manufacturing and selling coke, with the right to mine and prepare for market and sell coal, iron ore and other minerals, charter of which is recorded in agreement book, vol. 6, page 38.

4. The Percy Mining Company in securing title to the said coal did not secure the right to mine and remove the same, nor such rights as would release it from damages in consequence of any injury attending the balance of the freehold in consequence of the mining and removal of the said coal, and this condition seems to have been recognized in the early operations as, in most part, the coal that was mined was taken in such manner as to support and leave the overlying strata or surface intact by leaving

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sufficient pillars and ribs to hold it up.

Previous to 1905 the mining operations occasioned some injury to the surface, but an adjustment seems to have been effected to the satisfaction of the parties and there was then little or no complaint until about the time of the filing of the bill in this case, in November, 1905, when the defendant was prosecuting the work of mining and removing the ribs and pillars aforesaid, and as a consequence caused injury to the plaintiff's land, by the surface or overlying strata sinking and making holes of irregular shape, and varying in size and depth, to stop which and preserve their premises the plaintiffs filed the bill in this case and sought relief in equity, asking that the defendant be restrained from mining and removing the coal within and underlying the said 46 acres and 137 perches, without leaving or providing sufficient ribs, posts, pillars or supports to prevent the sinking, falling or caving-in of the overlying strata or surface, and from mining and removing or in any way interfering with the coal within and underlying the remaining portion of the said 80 acres 32 perches, moving the court for a preliminary injunction, accordingly, on which motion the parties appeared and submitted considerable testimony, from which, with the admitted facts, we make the foregoing findings:

CONCLUSIONS OF LAW.

1. There is no question but that, under the aforesaid facts, the defendant is liable in damages and the plaintiffs are entitled to recover judgment against it for all injuries of whatsoever character occasioned, to the surface or overlying strata, by the mining and removal of the coal aforesaid. The questions for determination are:

(1) Does the ownership of the coal by the defendant, with the duty of supporting the surface attached, authorize and empower it to remove all the available coal, regardless of consequence to the overlying strata?

(2) Can it take coal under such circumstances, if it recognizes its liability for injury and stands ready to pay damages as soon as they are ascertained?

(3) If the plaintiffs elect to have their surface maintained in its natural condition rather than have it disturbed, and be paid damages for the injury done, do they have the right to choose accordingly, and require the defendant to leave sufficient coal standing to support the surface or provide otherwise for the permanent support thereof?

There is such relative connection between these questions that we think they can be considered jointly, and in view of the facts established in this case, we incline strongly to the conviction that the principles controlling are well set forth in *Allshouse Estate*, 23 Superior Ct. R. 146, where, inter alia, the Superior Court by Morrison, J., says: "*Jones* v. *Waoner et al.*, 66 Pa. 429, by its syllabus and doctrines establishes the following rules: '(1) By partition the surface was severed from the underlying coal, and the parts were allotted to different heirs without any limitation as to the removal of coal; held, that the owner of the coal could not remove it without leaving sufficient support for the surface. (2) The mining property is servient to the surface, to the extent of sufficient supports to sustain it, and on default the owners and workers are liable for damages. . . . . (5) The upper and underground estate are governed as other estate, by the maxim *sic utere tuo ut alienum non laedas.*'"

In *Coal Co.* v. *Fuel Gas Co.*, 131 Pa. 522, *Jones* v. *Wagner*, *supra*, is quoted with approval (page 532), where Mr. Justice Williams, speaking for the Supreme Court, says: "What is the effect of the severance of the coal from the surface? If the sale of the coal be made in the usual manner, the purchaser takes it subject to the burden of surface support, and cannot remove it without leaving a sufficient quantity to support the surface." . . . .

In *Pringle* v. *Coal Co.*, 272 Pa. 438, *Jones* v. *Wagner*, *supra*, is quoted with approval, and the Supreme Court say, (page 441), "In that and other cases following in its wake, it has been uniformly held, that where there has been a separation of the coal from the surface, the owner of the latter, in the absence of agreement to the contrary, has an absolute right to have his surface supported precisely as it was in its natural state."

In *Robertson* v. *River Coal Company*, 172 Pa. 566, the subject of surface support is

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considered by the Supreme Court (p. 571) where Mr. Justice Williams, speaking for the court on this subject, says: "The cases in which it has been applied by the courts are too numerous for citation here and embrace a wide range of subjects. It was held applicable to the owner of successive strata in the earth's crust, in *Jones* v. *Wagner*, 66 Pa. 429, which appears to be the first case in which obligations of the owner of the subjacent estate came before this court for consideration We held in that case that where the mineral estate is severed from the surface, by a conveyance, the lower estate passes to the grantee subject to the servitude imposed upon it by nature, for the support of the surface. The surface owes to the lower estate an easement or servitude for access. The lower estate owe to each other and to the surface an easement for place to answer the purposes of support for the surface unless the owner of the surface has released his right to support. This rule has been recognized and applied in many cases. . . . . This right to support may be released by apt words in a deed of conveyance, *Scranton et al.* v. *Phillips et al.*, 94 Pa. 15, but such release will not be implied from language that does not necessarily import it." . . . .

In *Coleman et al.* v. *Chadwick*, 80 Pa. 81, in the opinion of the Supreme Court, on page 87, we find the following: "And all the privileges necessary for the convenient working, running and transportation of said coal, and deposition of excavated matter, and also all rights and privileges incident or usually appurtenant to the working and using of coal mines. But we cannot perceive that this grant in any way comprises the grantor's right to surface support. If, indeed, the destruction of the superincumbent estate be one of the privileges necessarily incident and appurtenant to coal mining, the said indenture does convey the right contended for. As, however, we have just determined that such destruction of the surface is in no way incidental to such mining we must necessarily refuse our assent to the construction contended for. . . Support is part and parcel of the reserved estate; it is of common right, and hence must pass, if at all, by express grant, and is not to be defeated by mere implication arising from language that does not import such an effect."

In view of which we are of opinion and hold that title to the coal alone does not authorize the defendant to remove all of it, regardless of consequences to the surface even though the defendant recognizes its liability for damages, and stands ready to pay them as soon as ascertained. If the owner of the overlying strata or surface elect that it shall be maintained intact, he has the right to do so; and upon his so electing we are of opinion that he is entitled to an injunction restraining such removal, at least, until the parties attempting to remove, arrange either by filling the space occasioned by such removal with other substance or otherwise, to support and preserve permanently the natural condition of the surface or overlying strata.

Any other theory, and especially that contended for by the defendant, might work irreparable hardship, and instead of being disposed to promote justice, could well be made to serve the purposes of fraudulently disposed persons or parties; as for instance, suppose we owned a valuable farm underlaid with this vein of coal, and in consequence of it being an old homestead and the associations connected therewith, or for any other reason, we were anxious to maintain it intact, and for no amount of money would we agree to have the coal mined and the surface disturbed, the injury would be "of a character not susceptible of measurement or estimation in damages." Yet, some coke manufacturing concern was very anxious to secure our coal, we would advise it as to our reason for not selling, it would reply, sell the coal to us without mining rights, as to release of damages, etc., and we will then have to leave sufficient coal to support the surface in its natural condition, and we would agree to do so, and at the time of making deed we would suggest that it be so expressed in the deed that the surface should not be disturbed by mining, etc., the answer would readily come, that it is not necessary, as our Supreme Court has decided that point over and over and over again, and would refer us to the above cited authorities. We would close the deal and

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then, because in its opinion it could make more money out of the coal it would have to leave to support the surface than a jury would assess against it as the damages it would be required to pay, it would proceed to disregard its promise and the aforesaid decision and take out all of the coal and practically destroy not only the money value of our farm, but the sentiment and association, which have no money value, and could not possibly be paid for in dollars.

We are not aware of this exact point ever having been raised or decided, but in view of analogous propositions, considered and decided on the law side of the court, we think our conclusion is warranted and will hold accordingly until reversed or advised otherwise by higher court.

2. In such cases will equity interpose by injunction to restrain the owner of the coal from removing the same, and causing injury to the surface without providing for its support? Does this court have jurisdiction?

In *Walters* v. *McElroy et al.*, 151 Pa. 549, the Supreme Court say: "By the thirteenth section of the act of June 16, 1836, made general as to the court of common pleas throughout the commonwealth by the act of February 14, 1857, P. L. 39, it is enacted that 'The Supreme Court when sitting in banc, in the city of Philadelphia, and the court of common pleas of the said city and county, shall have the power and jurisdiction of courts of chancery so far as relates . . . . to the prevention or restraint of the commission or continuance of act contrary to law and prejudicial to the interests of the community, or the rights of the individuals.' Under this section it has been repeatedly and uniformily held that injunction is the appropriate remedy for the prevention of trespasses and nuisances which, by reason of the persistency with which they are repeated, threaten to become of a permanent nature. . . . . It is the appropriate remedy for such torts because they are within the letter and the spirit of the statute, and it is no objection that the injured party may have a remedy at law. In such cases the legal remedy may be and usually is wholly inadequate. The damages are frequently difficult of computation, and where they may be readily assessed it will often happen that the expense of a recovery will exceed the amount recoverable for any one of the successive trespasses. It is therefore a wise provision of the legislature that enabled the courts to put an end by a single decree to to such controversies as are presented in this record, and the jurisdiction ought not to be addicated. From this it is not to be inferred, however, that injunction is the appropriate remedy for a single trespass, or for any number of trespasses in the absence of a threat either expressed or inferred from the nature of this commission that they will be repeated."

And in the same case "As to the principles invoked, that the chancellor will refuse to enjoin when greater injury will result from granting than from refusing an injunction, it is enough to observe that it has no application where the act companied of is in itself as well as in its incidents tortious. In such cases it cannot be said that injury would result from an injunction, for no man can complain that he is injured by being prevented from doing to the hurt of another that which he has no right to do. Nor can it make the slightest difference that the plaintiff's property is of insignificant value to him as compared with the advantages that would accrue to the defendant from its occupation."

The same general principles are recognized and set forth on pages 23 and 309 of the second edition of "Spelling on Injunctions and other Extraordinary Remedies," averring, in addition, that a court of equity may lend its extraordinary aid by injunction, notwithstanding the existence of a nominal remedy at law, when a legal settlement of the question would involve a multitude of suits, which we think applies here with considerable force. We are, therefore, of opinion and hold that a court of equity has jurisdiction in this case.

DECREE.

Now, July 20, 1906, this matter came on to be heard and was argued by counsel; and now, July 26, 1906, upon and after due consideration it is ordered, adjudged and decreed that, upon the plaintiffs filing proper and necessary injunction affidavits, and bond to be regularly approved in the sum of $1,000, conditioned as required by law the

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motion for a preliminary injunction will be sustained, and a preliminary injunction directed to issue enjoining and restraining the defendant, its officers, agents, employes and workmen, and each and every one of them from mining and removing the coal within and underlying the aforesaid 46 acres and 137 perches, without leaving or providing sufficient ribs, posts, pillars or supports to prevent the sinking, falling or caving-in of the overlying strata or surface, and from mining and removing or in any way interfering with the coal within and underlying the remaining portion of the said 88 acres and 32 perches until final hearing and further order of the court.

For plaintiff, *Cooper & Van Swearingen.*

[From J. E. Gastelger, Esq., Johnstown, Pa.]

CONSTITUTIONAL LAW. (CITIZENSHIP OF CORPORATION). "A Legal Fiction with Its Wings Clipped," by Simeon E. Baldwin, in the January-February *American Law Review* (V. xli, p. 38), is a discussion of the fiction by which the United States Supreme Court decided a corporation to be a citizen of the state to which it owed its existence, not because it was "an artificial person of its creation, having no right to exercise its franchiseelsewhere; not because its managing officers were exercising its franchises there; not because all its shareholders were in fact citizens of the state; but because the court had concluded to make the false assumption that they were, and to hear no proof to the contrary. . . .

"This fiction took definite, and, as it was supposed, final shape in 1862, at the hand of Chief Justice Taney, in the Ohio & Mississippi Railroad case. But as time went on, and corporations of an interstate character and composition became numerous and powerful, new difficulties became apparent in working under it. The Supreme Court, in 1896, apologetically described its creation as a step which 'went to the very verge of judicial power.' Nine years later, in Doctor v. Harrington, they marked the limits of the verge, but in such a way as practically to overrule many of their earlier decisions.

"New Jersey shareholders in a New York corporation brought, by reason of their interest as such, a bill in equity against another New York corporation, to which they made the former corporation a defendant, on an apparently good cause of action in the Circuit Court. The cause was dismissed because of the conclusive presumption that all the shareholders of each company were citizens of New York. . . . On an appeal to the Supreme Court this decree was reversed. The reason, said the brief opinion by Justice McKenna, for addopting the presumption, was to establish the citizenship of the corporation for the purpose of jurisdiction in the Federal Courts. 'This, then was its purpose, and to stretch it beyond this is to stretch it wrong. It is one thing to give to a corporation a status and another to take from a citizen the right given him by the Constitution of the United States.' "

A new generation of judges had twisted an old theory into new shape, thinks Judge Baldwin. "The real error of the Supreme Court . . . lay in Marshall's rejecting the first claim set up in the Deveaux case. A corporation should have been held by virtue of its own personality, to be a citizen of the state which created it, within the meaning of Article III of the Constitution, notwithstanding it could not be deemed a citizen within the meaning of Article IV. The purposes of the two provisions were obviously so different, that the word citizen might fairly be taken to have in each a different sense.

"To treat an artificial person thus as a citizen might have been itself indeed the assertion of a legal fiction, but it would have been a fiction far simpler and more manageable than one created by a legal presumption of a state of facts which, in nine cases out of ten, everybody knew did not and in the nature of things could not exist."—*The Green Bag.*

A corporation organized for the generation of electricity under legislative authority for public service is held, in Townsend v. Norfolk Railway & Light Co. (Va.) 4 L. R .A. (N. S.) 87, not to be acting its public capacity in locating its power house, so as to be absolved from liability for injuring neighboring property by the smoke, noise, and escaping electricity incident to its business.

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DISTINCTION BELWEEN FLATS AND APARTMENT HOUSES. In these days of the popularity of flat buildings a judicial construction of the distinction between a flat and an apartment will be of interest. The question was brought before the Supreme Court of New Jersey in the case of Lignot v. Jaekle, 65 Atlantic Reporter, 221. The court says that a flat or flat-house is a building consisting of more suits of rooms on each floor, equipped for private housekeeping purposes. An apartment house is either a building divided into separate suits of rooms intended for residence but commonly without facilities for cooking. It was contended that the proper distinction depended upon the amount of rent which was paid. The court concedes the possibility of this, but holds that the payment of $40 a month rent will not convert a flat into an apartment.

In Ormandroyd v. Fitchburgh & L. St. R. Co., 78 Northeastern Reporter, 739, the Massachusetts Supreme Court passes on the degree of care which a street railroad company must take for the protection of passengers. During a Fourth of July celebration, a patriotic citizen discharged a cannon "from four o'clock in the morning until half past five in the afternoon, as often as it could be loaded." The cannon was on a street upon which the cars passed, and a passenger was injured by being struck by some of the wadding of the cannon. It is held that the carrier was not liable, as it had no reason to anticipate danger to its passengers from such a source.

The duty of the owners of an office building to keep in proper condition the portions of the building retained in his possession is held, in Whitcomb v. Mason use of Levinson (Md.) 4 L. R. A. (N. S.) 565, not to extend to keeping outer doors unlocked on Sunday to enable tenants to remove large pieces of furniture in case of fire.

The right to set up the breach of a contract in defense of an action upon an account stated, for money earned under it, is sustained in Gutshall v. Cooper (Colo.) 6 L. R. A. (N. S.) 820.

The right of nonresident alien parents, next of kin of a minor son whose death was wrongfully caused by the negligence of another, to maintain an action to recover for his death, is sustained in Atchison, T. & S. F. R. Co. v. Fajardo (Kan.) 6 L. R. A. (N. S.) 681.

The proprietor of a bath house, who, for a consideration, furnishes bath rooms, bathing suits, and other accessories of the bath to those who desire to bathe in the sea, and also receives their money, jewelry, or other valuables for safe-keeping, is held, in Walpert v. Bohan (Ga.) 6 L. R. A. (N. S.) 828, to be a depositary for hire in relation thereto, and to be liable for loss occuring from want of ordinary care on his part.

In re Erie Lumber Co., reported in 17 Am. B. R. 689, holds that courts of bankruptcy, under their authority conferred by section 2(5) to continue the business of bankrupts for limited periods by receivers, may authorize an issue of receiver's certificates to raise a fund to meet the necessary running expenses, and a bank which, with full knowledge of the bankruptcy proceedings, participates in the transactions of the receivership, will be precluded from insisting upon the priority of its mortgage over the operating expenses or other obligations incurred by the receivers in conducting the bankrupt's business, with intent to conserve the security of the mortgage.

It is also held, in In re Erie Lumber Co., 17 Am. B. R. 689, that it is the duty of merchants and others dealing with receivers in bankruptcy to look to the extent of their authority, and where such receivers are, by the order appointing them, authorized to borrow money and incur obligations to an amount not exceeding in the aggregate $3,000 for the purpose of continuing the business of the bankrupt and defraying the necessary expenses, the claims of persons upon a general indebtedness for goods and supplies furnished to the receivers subsequent to the date of an order authorizing their issue of certificates for the $3,000 are not entitled to priority of payment.

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PITTSBURGH, PA., JULY 8, 1907.

Court of Common Pleas No. 2,

ALLEGHENY COUNTY.

HOHENSTEIN et al. v. PERELSTEIN et al.

Trade mark—Infringement of—Equity—Injunction.

Where the imitation of a trade mark is of such a likeness as is calculated to deceive the public and is used with such intent, the owner of the trade mark is entitled to an injunction for the protection of his rights.

Plaintiff, a shoe dealer, made and sold a peculiar broad-toed shoe, known as the "Carter" shoe, and had been granted the right to register this name as his trade mark under the act of June 20, 1901. The defendant, also a shoe dealer in the same locality, subsequently made and sold a similar shoe advertised and marked under the name of the "Captain Carter Foot Form Shoe." Held, that defendant's action constituted an infringement of the plaintiff's right to the name "Carter," which was the distinguishing word of the trade mark, and that equity would restrain the use by him of this name in the sale of this shoe.

No. 71 January Term, 1906.

Opinion by MILLER, J., specially presiding. Filed November 17, 1906.

The bill is to restrain the defendant from advertising and selling a shoe known as the Carter Shoe, or the Captain Carter Foot Form Shoe, alleging that it is an attempt to infringe upon plaintiffs trade mark, and an attempt to deceive by selling said shoe as the Carter shoe, the sole right of which belongs to the plaintiff.

The answer denies the infringement and avers that the name used is separate and distinct from that used by plaintiff; that there has been no deception and no intention to deceive the public in the sale of defendants shoes as those sold by the plaintiffs.

FINDING OF FACTS.

1. The plaintiffs are at present doing business under the name of the Griswold Shoe Company, the same being the retail shoe business at No. 217 Smithfield street, Pittsburgh. Hohenstein, one of the plaintiffs, for a number of years before carried on the same business in the basement of the Marine National Bank at No. 301 Smithfield street, being on the opposite corner from that now occupied by the plaintiff.

2. The defendants conduct the retail shoe business at present in the basement of No. 301 Smithfield street, formerly occupied by the plaintiff, into which place they moved April 1, 1901, and from which the plaintiffs removed February 1, 1901.

3. For a number of years one, David Carter, had been in the shoe business on Fifth avenue, near Wood street, and had made a specialty of a peculiar shaped broad toed shoe, which he advertised as the Carter shoe, made for comfort and tender feet. These shoes were made upon lasts which Carter designed. When Carter retired from the shoe business, some four or five years ago, he sold and assigned to Hohenstein, one of the plaintiffs, the lasts upon which this peculiar shoe, known as the Carter shoe, was made and manufactured, and also gave him the right to sell and advertise said shoe as the Carter shoe in the same manner as he, Carter, had done when in business. Hohenstein made a specialty in his business of this broad-toed Carter shoe, and adopted the word "Carter" as a trade mark. He made special efforts and spent large sums of money in advertising said shoe, by reason thereof established an extensive sale or business therefor.

4. After the plaintiff had removed from 301 Smithfield street and defendant moved in, the latter advertised and sold a broad-toed shoe similar to that described in the third finding of fact, marking the ribbon used for pulling on the shoe with the name on the inside "The Captain Carter Foot Form Shoe," whereupon the plaintiffs caused notice to be given defendant and other shoe dealers that he had the sole right to manufacture and sell this shoe under the

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name of the Carter shoe, and that he had made application for and had been granted the right to register said name as his trade mark under the act of June 20, 1901; this trade mark consists of the word "Carter," preferably arranged below the picture of a carter driving an animal; this trade mark grant provided that the same as registered was intended to be appropriated to dealings in boots, shoes and footwear; that the grantee has the right to use the same, and that no other person or persons, co-partnership or corporation has a right to such use, either in the identical form or in any other such near resemblance thereto, as may be calculated to deceive. The defendants subsequent to notice from the plaintiff and to notice of the registry of plaintiffs trade mark, on September 14, 1905, twelve days after the last notice, stated to two customers who wanted a broad-toed shoe, "yes, I know what you want, the Carter shoe," and produced a shoe with the tag or ribbon marked "Captain Carter Foot Form Shoe," and sold the same to them. There was also evidence that they sold shoes under said name as the Carter shoe to a man by the name of Tillbrook. The further fact is found that the defendants, at No. 301 Smithfield street, exhibit and advertise with the picture hereinafter described, and sell a shoe similar in all appearance to that sold by the plaintiffs, which is marked on the ribbon as herebefore described, the Captain Carter Foot Form Shoe."

5. The defendants and one, Carter, a steamboat pilot or captain, entered into an agreement that Carter's photograph should be taken holding this style of shoe in his hand, and that the same should be exposed in their show windows among the shoes which were tabbed or marked as hereinbefore set forth the Captain Carter Foot Form Shoe.

CONCLUSIONS OF LAW.

1. The use of the words the Captain Carter Foot Form Shoe on the defendants ribbon attached to their shoes, taken in connection with their oral representations in making sales that said shoes were the Carter shoes is an infringement of plaintiff's right to the name "Carter," and an imitation of plaintiff's trade mark to that extent; it is the use of such a likeness or imitation thereof as is calculated to deceive, and was used by the defendant with intent to deceive the general public, and to deprive the plaintiff of his right thereto to that extent.

2. An injunction will be granted restraining the defendants from advertising or selling their broad-toed shoes under the name and with the label of the Captain Carter Foot Form Shoe, or representing the same to be in any way the Carter shoe.

3. The penalty fixed by the trade mark act of 1901 will not be imposed; but this without prejudice to the plaintiffs to bring suit therefore in a court having jurisdiction of an action for a fine or penalty.

4. The plaintiffs are entitled to an accounting from defendants for all shoes sold under the name of the Captain Carter Foot Form Shoe, or of the Carter shoe.

5. The defendants must pay the costs of these proceedings.

OPINION.

David Carter originated, manufactured, stamped with his name and sold this special broad-toed shoe so designed according to his own ideas, built from lasts of his own invention; for the sale of these shoes thus manufactured and advertised he built up an extensive trade.

Hohenstein by permission and purchase from Carter acquired all the rights Carter exercised or claimed. The reputation and sale of the Carter shoe was well established, Hohenstein as Carter's successor had the exclusive privilege and a valuable asset. So far as it was possible he protected his right and property by obtaining from the state a recognition of said right under the trade mark provision of the act of 1901. The reputation of the name, and of the shoe itself being thus established and having acquired a large sale, when Hohenstein moved from the basement of 301 Smithfield street, and Perelstein moved in, the latter desired to hold or make trade for what might be passed off as the Carter shoe. To carry it into effect he devised the scheme upon which his defense is based, to-wit: the arrangement with a steamboat pilot as to the photograph and the use of the name Captain Carter Foot Form Shoe found on the inside of the tag or strap used to pull the shoe on. De-

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fendants contention that this was not intended to infringe upon plaintiffs sale of the well established Carter shoe is not borne out by the facts, in view of the testimony that in at least two instances they sold shoes not as the Captain Carter Foot Form Shoe, but as the Carter shoe. By this deceitful practice defendants imposed upon the public to the prejudice of the plaintiffs. The manner of marking and advertising the so-called Captain Carter Foot Form Shoe is calculated to deceive the incautious and unwary, and thereby deprive the plaintiffs of their just gains and profits: *Colton* v. *Thomas*, 2 Brewster 308.

The similarity amounted to false representation that defendants' shoes had the same origin and that they are of the same manufacture as plaintiffs: *Dixon Crucible Company* v. *Guckenheimer*, 2 Brewster 321.

The name "Carter" stamped upon the soles of plaintiffs' shoes, coupled with the manner in which the manufacture and the use of the same began and continued, distinguishes their origin and make, and protects an infringement thereof, and is within one of the principles deduced by Upton, and affirmed in the case last cited.

The defendant has pirated from plantiffs' trade mark that which gives it its chief value, to-wit: the name "Carter," and is using it in connection with the other words on his shoe. This name is the distinguishing feature; eliminating it from the trade mark, its distinctive characteristic is gone: *Ayer* v. *Hall*, 3 Brewster 509.

The registry of plaintiffs' trade mark and and the grant of the commonwealth to use the same was notice to the world of a property right therein; of this, defendants had specific notice and therefore proceeded at his peril.

While the defendants' imitation or use of the name "Carter" is only partial, containing such additions or variations as to be readily disclosed on comparison, yet it is manifest that a resemblance exists; the use of the name "Carter" was designed to mislead and did mislead; and when it came to the actual sales found in the findings of fact no attempt was made to impress on the purchaser the fact that the shoe sold was any other than the well known Carter shoe.

The current of authority is that no premium or encouragement will be given "to the cunning and crafty" to exercise their ingenuity to accomplish by cheating, skilfully executed, that which they would not be allowed to do by a direct and undisguised piracy: *Colton* v. *Thomas*, *supra*.

The conclusions heretofore reached are amply sustained by the application of the principles announced in *Heintz* v. *Lutz*, 146 Pa. 608; *Vanstand's Stratena Limited* v. *Vanstand*, 209 Pa. 564; *Paul on Trade Marks*, page 210.

For plaintiffs, *Jas. T. Buchanan.*

For defendants, *Marcus W. Stoner.*

(Common Pleas No. 2, Allegheny Co.)

BORO OF MT. OLIVER v. BORO OF KNOXVILLE et al.

Street—Location of by judicial proceedings—Bill to compel change of location.

Where the location of a public road, which is the dividing line between two boroughs, has been fixed by a decree of court a number of years before by equitable proceedings to which the abutting property owners and all others in interest were made parties and in accordance with which a street railway has located its tracks in the center of the street, the court will dismiss a bill filed by one of the boroughs to compel the railway company to change the location of its tracks on the ground that the decree of the court as to the location of the road was erroneous and that in order to place the tracks in the center of the street they should be moved three feet from their present location.

No. 1002 October Term, 1906.

Opinion by FRAZER, P. J. Filed March 5, 1907.

The purpose of this bill was to compel the Pittsburgh Railways Company, as lessee of the Suburban Rapid Transit Street Railway Company to change the location of its tracks upon Southern avenue, where that avenue forms the dividing line between the plaintiff and defendant boroughs, and also to restrain the borough of Knoxville from interfering with or preventing such change or relocation of tracks. From the bill, answers and proofs, we find the following facts:

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FINDING OF FACTS.

1. The boroughs of Mt. Oliver and Knoxville are municipal corporations created under the general borough laws of this commonwealth, the former in the year 1892, and the latter in the year 1877, one of the dividing lines between the two boroughs being Southern avenue.

2. Southern avenue was formerly the Birmingham and Brownsville Macadamized Turnpike Road. It is a main highway between the southern portion of the county and the city of Pittsburgh. The vehicle traffic upon it is considerable, and the street-cars pass at intervals of from three to five minutes. The avenue is fifty feet in width, and between Carbon street and the line of Carrick borough is the dividing line between the plaintiff and defendant boroughs.

3. The Birmingham and Brownsville Macadamized Turnpike Road Company was a corporation organized under a special act of assembly, approved February 15, 1851, P. L. 56, by which act it was given power to lay out, construct and complete a macadamized turnpike road between Josephine street in the city of Pittsburgh and the village of Whitehall in Baldwin township, Allegheny county, a distance of about six miles, "following as nearly as practicable the course of the old Brownsville road." The act of incorporation further provides that the road shall not be less than fifty nor more than sixty feet in width. The road as laid out by the company was opened for travel within a year or two after the passage of the act of 1851.

4. At No. 783 July Term, 1898, a bill in equity was filed in this court by the Birmingham and Brownsville Macadamized Turnpike Road Company against a number of persons owning property abutting upon its road. The bill set forth that a controversy had arisen between the Turnpike Road Company and certain abutting property owners as to the lines of the turnpike road, and asking that a decree be made determining such controversy. Subsequently, by amendment, all owners of property abutting upon the line of the road, except possibly three persons who are not now objecting, were made parties to the proceeding. Upon hearing, and after a survey had been made, a decree was filed June 17, 1899, at the above number and term, fixing the width of the road at fifty feet and establishing its lines and the property lines of abbuting owners. That decree seems to have been satisfactory to all parties to the proceedings, no exceptions having been filed thereto or appeal taken therefrom.

5. In 1890, the Suburban Rapid Transit Street Passenger Railway Company, a corporation created under the act of 1889, which company is now leased to and operated by the Pittsburgh Railways Company, with the consent of the Birmingham and Brownsville Turnpike Road Company and also the supervisor of the township of Lower St. Clair, laid its tracks upon the turnpike road and began operating thereon a street passenger railway, and contiued to occupy the same and operate its cars thereon, upon the tracks originally laid down, until the year 1899, after the decree referred to in the previous finding was made, when, with the consent of the Turnpike Road Company, and without objection on the part of property owners, the tracks of the railway company were moved to the center of the road as fixed by that decree, where they have since remained and are at present.

6. In the year 1900, at No. 24 September sessions, 1900, of the Court of Quarter Sessions of this county, upon proceedings duly had, the property and franchises of the Birmingham and Brownsville Turnpike Road Company were condemned and appropriated by the county of Allegheny, and thereupon that portion of the road dividing the boroughs of Mt. Oliver and Knoxville became subject to the jurisdiction of those boroughs respectively; that is, the north half of the road became a highway of the borough of Knoxville and the south half became a highway of the borough of Mt. Oliver.

7. The tracks of the Pittsburgh Railways Company from outer rail to outer rail occupy 15.2 feet of the avenue, which leaves 17.4 feen for roadway and sidewalk in each borough, clear of all obstructions. To avoid accidents and interferences by vehicles with the cars of the railway company, there should be in each borough a roadway between the tracks and the curbs of the sidewalks of not less than nine feet.

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8. The borough of Knoxville has recently improved its portion of Southern avenue by adding to its width for both sidewalk and road purposes a strip of ground from abutting property ranging from six and one-half to ten feet in width. It has also paved its roadway with virtrified brick and put down sidewalks, the curb-line being located at from twelve to sixteen feet from the outer rail of the car track.

9. The borough of Mt. Oliver has by an ordinance recently passed, established the width of sidewalks in the streets of the borough, and is about to improve that portion of Southern avenue within its limits. In making such improvement the borough proposes to widen the present sidewalk and decrease the width of the present roadway, and to that end has located the curb-line at a distance ranging from six to nine feet from the outer rail of the car tracts, and is preceeding to place the same in accordance with such location.

10. The contention of the borough of Mt. Oliver is that the decree of this court of 1899, fixing the line of the turnpike road and the lines of property abutting thereon, is erroneous, and that the tracks of the Railways Company, to be in the center of the avenue, properly should be moved and reconstructed at an average distance of three feet westerly, that is, on the Knoxville side of the avenue.

CONCLUSIONS OF LAW.

1. The contention of the borough of Mt. Oliver is without merit. Previous to either borough obtaining jurisdiction over Southern avenue, its lines and also the lines of abutting property owners were established satisfactorily to all concerned under proceedings in equity had in this court. Subsequent to the making of the decree in that case, and with the consent of the turnpike company, the tracks of the railway company were reconstructed in the middle of Southern avenue as established by our decree, and have remained there since that time without objection from any source until the present proceeding was instituted. What right the borough of Mt. Oliver has at this time to question those proceedings and the decree made therein, has not been made apparent. That proceeding was between property owners to establish property lines and did not concern the borough, and if the decree was satisfactory to the owners of the property, and that includes the turnpike company, the borough must also be satisfied, as it is bound by what the turnpike company did in the matter. The county of Allegheny purchased just what the turnpike company had at that time, and one-half of what the county purchased is all the borough received. The lines of the avenue had been fixed, the decree of court had been made and the tracks of the railway had been reconstructed when the borough accepted jurisdiction; it was therefore bound by conditions as it found them, and had no right to now question what was settled by the former owner of the property. Plaintiff not being entitled to the relief prayed for, the bill must therefore be dismissed at its costs.

Let a decree be drawn accordingly.

For plaintiff *J. W. Kraus* and *Carney & Martin.*

For defendant *W. D. Grimes, S. M. Myers* and *Reed, Smith, Shaw & Beal.*

(Common Pleas No. 2, Allegheny Co.)

GEISLER v. BROWN.

Right of way—Adverse possession—Injunction.

Upon hearing a bill for an injunction to restrain the defendant from obstructing plaintiff's way across his land to a public road, if from the plaintiff's evidence it is uncertain whether the user was adverse for more than twenty-one years or founded upon friendly permission only, an injunction will be refused.

No. 552 October Term, 1906. In equity.

Opinion by SHAFER, J. Filed February 20, 1907.

The bill is for an injunction to restrain the defendant from obstructing a way across the defendant's land, claimed by the plaintiff.

FINDINGS OF FACT.

1. The plaintiff is the owner of a tract of land containing about 30 acres in Robinson township, Allegheny county, adjoining the land of the defendant, which is a tract containing about 15 acres, and lies between the land of the plaintiff and the public road

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known as the Diebold township road.

2. Across the plaintiff's land from the land of the defendant is a tract of land belonging to one, Phillips, and the Phillips' land adjoins another public road. The land of the plaintiff is not reached by any public road.

3. The deed by which plaintiff acquired title to his land, being a deed from the heirs and devisees of John Gibson, deceased, conveys to the plaintiff, as appurtenant to the land, a right of way over the Phillips farm to the public road adjoining the Phillips land, and mentions no other right of way.

4. The plaintiff claims to have by prescription, arising from user by himself and those whose estate he has for upwards of thirty years, a right of way across the land of the defendant to the Diebold road. The way so claimed is plainly marked on the ground and passes beside one of the buildings of the defendant, and was used to a greater or less extent by the occupants of the land for more than twenty-one years before the defendant acquired title. This user was testified to by a considerable number of witnesses, and no evidence was given to the contrary. As to whether the user was adverse, or merely founded upon friendly permission to the former owners of the plaintiff's land, the plaintiff's testimony was not so clear. Under the evidence given by the plaintiff we are unable to find that the plaintiff had an adverse, hostile user of the way in question for more than twenty-one years, so certainly that there can be no question about it, and so certainly that if the evidence had been submitted to a jury, a verdict against the plaintiff could not be allowed to stand.

CONCLUSIONS OF LAW.

Under the rule laid down in *Washburn's Appeal*, 105 Pa. 480, and *O'Neill* v. *McKeesport*, 201 Pa. 386, we are of opinion that the plaintiff is not entitled to a decree for the reason that his remedy is at law. It is true that in a number of cases an injunction has been granted to restrain the obstruction of an alley way or right of way where the plaintiff had not established his right at law, but these were only cases where the right was not in dispute or if disputed was so clearly established that a verdict against it could not be allowed to stand. The bill must therefore be dismissed with costs to be paid by the plaintiff.

Let a decree be drawn accordingly.

For plaintiff, *J. C. & W. C. Dicken.*

For defendant, *S. S. & C. B. Mehard.*

Court of Common Pleas,

WASHINGTON COUNTY.

HOGG v. WASHINGTON OIL CO.

Act of April 19, 1901, P. L. 89—Replevin—Bonds—Practice.

A, the plaintiff in an action of replevin, filed a demurrer alleging the defendant's bond was not sufficient. Held, the prothonotary is the proper officer to pass on a bond in the first instance.

No. 85 November Term, 1906. Action of replevin to recover oil well tools. Rule on plaintiff to show cause why the bond filed should not be perfected by having added thereon a better or another surety. Demurrer to rule.

Opinion by McIlvaine, P. J. Filed June 25, 1907.

The demurrer filed to the defendant's exceptions to plaintiff's bond a rule to perfect the same involves a question of practice or procedure under the replevin act of April 19, 1901, which has not been provided for by any rule of our court. The 8th section of the act requires the prothonotary "in the first instance to fix the amount of bail and approve or reject the security offered; his action in either regard shall be subject to revision of the court." A proper practice under this provision of the act would be for any party dissatisfied with the amount of a bond or the sureties thereon to file his exception in the first instance with the prothonotary and have him accord the party complaining a hearing. If he dispose of the matter satisfactorily to both parties and his decision is complied with, that is the end of the matter; if either party is dissatisfied he can take an appeal to the court to have the order of the pronthonotary revised.

In the case before us we think the defendant should file his exceptions to the bail with the prothonotary and ask him to pass upon the matter and then if he does not dispose of the matter satisfactorily, either

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party dissatisfied may appeal to the court.

And now, June 25, 1907, demurrer to rule to perfect bail sustained without prejudice to the right of the defendant to file his exceptions with the prothonotary and have him after hearing pass upon the sufficiency of the bond and the goodness of the surety, with the right of appeal by either party if his decisions is not satisfactory.

For plaintiff, *James C. Braden.*

For defendant, *T. F. Birch.*

[From Harry Russell Myers, Esq., Washington, Pa.]

Executive Department,

HARRISBURG.

PHILADELPHIA COMPANY.

Corporations—Application for charter—Statement of purpose—Powers—Acts of 1874, 1889 and 1901.

An application for charter which contains a statement of the powers which the applicants desire the proposed corporation to exercise, rather than a statement of the purpose for which it is formed, is defective.

Applicants for a charter cannot specify the powers they desire the corporation to exercise under the guise of a statement of purpose. The applicants must state the purpose and the law will define the powers of the corporation.

The purpose for which a corporation is formed is one thing; what it has power to do after incorporation is something entirely distinct.

The act of July 9, 1901, P. L. 64, does not amend in any way the powers of corporations; it is an amendment of a paragraph of a section of the act of 1874, relating to the purposes for which corporations may be formed.

The specific function of the act of May 9, 1889, P. L. 159, is to enlarge the powers of certain corporations.

When the purpose of a corporation is the "buying, selling, collecting, and guaranteeing payments of ground rents, mortgages, and other real estate securities," the corporation will have power to make such contracts as are within the sphere of its functions. Such business is lawful and can be chartered under the amendatory act of 1901, providing for the transaction of any lawful business.

Because such company would incidentally have some of the powers expressly conferred by the act of 1889 upon title insurance companies is no objection to the granting of a charter.

An application for the incorporation of a company which states that it is formed for the purpose of "making contracts of every description relating to mortgage notes, and bonds, to mortgages and other liens upon real estate in Pennsylvania, and in ground rents, including agreements of loan, pledge, sale, guarantee and collection, and the issuance of certificates and obligations thereby secured," practically states the powers and not the purpose, and the application should be amended.

Request of Secretary of the Commonwealth McAfee for opinion.

Opinion by TODD, Attorney-General. Filed May 13, 1907.

The application for the incorporation of the Philadelphia Company for guaranteeing mortgages, certifies that it is formed for the purpose of making contracts of every description relating to mortgage notes and bonds, to mortgages and other liens upon real estate in Pennsylvania, and in ground rents, including agreements of loan, pledge, sale, guarantee and collection, and the issuance of certificates and obligations thereby secured." You have asked my opinion whether or not a corporation can be created for the purposes above enumerated.

The difficulty with reference to this application for a charter arises from the fact that the applicants have inadvertently failed to bear in mind the distinction between the purpose for which a corporation is formed, and the powers that may be exercised by a corporation after its incorporation. The purpose for which a corporation is formed is one thing; what it has power to do after incorporation is something entirely distinct. Under paragraph 19 of section 2 of the corporation act of 1874, P. L. 73, a corporation may be formed for the purpose of "the insurance of owners of real estate, mortgages and others interested in real estate from loss by reason of defective titles, liens and incumbrances."

By section 29 of the same act, companies incorporated for the purpose of "the insurance of owners of real estate, mortgages and others interested in real estate," etc., are given the power and right "to make insurances of every kind pertaining to or connected withtitles to real estate," and "to make, execute and perfect such and so many

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contracts, agreements, policies and other instruments as may be required therefor."

By the supplement of the act of May 9, 1889, P. L. 159, the powers of such companies are greatly enlarged, enabling them, inter alia, to insure titles to real estate, to hold property in trust; to insure fidelity in persons holding places of trust; to act as assignees, agents, trustees, executors, administrators, etc. The act of 1889, however, in no way amends the purpose for which such corporations are to be formed.

On the other hand, the act of July 9, 1901, P. L. 64, amends the purposes for which corporations may be formed under paragraph 18 of section 2, act of 1874, supra, by providing that corporations may be formed "for the transaction of any lawful business not otherwise specifically provided for by act of assembly, provided, however, that no corporation shall be chartered under this amendment with the authority to transact more than one kind of business, which must be set forth in the charter."

This act 1901 does not disclose any intention to amend in any way the powers of corporations. The act of 1889 is an amendment of a section of the act of 1874 relating to the powers of certain corporations. The act of 1901 is an amendment of a paragraph of a section of the act of 1874 relating to the purposes for which corporations may be formed. Each of these acts of 1889 and 1901 has its particular and specific function, and one should not be confused with the other.

The defect in the application for the charter in question, lies in the fact that the second paragraph of the certificate for incorporation contains practically a statement of the powers which the applicants desire the proposed corporation to exercise, rather than a statement of the purpose for which it is formed. Applicants for a charter cannot specify the powers they desire the corporation to exercise under the guise of a statement of purpose. The applicants must state the purpose, and the law will define the powers of the corporation. The purpose of this corporation is really stated in the letter of counsel, written in support of the application for incorporation, wherein he states it to be the "selling, collecting and guaranteeing payment of ground rents, mortgages and other real estate securities." I think the word "buying" should probably be inserted before the word "selling," so that, if the purpose is expressed to be that of "buying, selling, collecting and guaranteeing payment of ground rents, mortgages and other real estate securities," the corporation will have power to make such contracts as are within the sphere of its functions. Because a company incorporated for the purpose of "buying, selling, collecting and guaranteeing mortgages," etc., would without doubt incidentally have some of the powers expressly conferred by the act of 1889 upon title insurance companies is no objection, in my opinion, to the granting of a charter. Many different corporations formed for different purposes, have similar or identical powers along certain lines.

In view of the fact that there is no act of assembly specifically providing for the formation of corporations for the purpose of "buying, selling, collecting and guaranteeing payments of ground rents, mortgages and other real estate securities" in Pennsylvania, which seems to be an entirely lawful business, there is no reason why a charter cannot be legally granted forming a corporation for such purpose under the amendatory act of 1901, supra.

I am, therefore, of opinion that the governor should withhold his approval of the present application, and that no letters patent be granted thereon until the application has been corrected in such a way as to state the purpose for which the corporation is to be formed, and if the application should be amended so as to state the purpose substantially in the manner above indicated, I am of opinion that the application should be approved and letters patent granted thereon.

I return herewith the application for incorporation, together with the correspondence and other documents submitted to me.

[From Paul A. Kunkle, Esq., Harrisburg, Pa.]

The procurement by a prisoner of tools adapted to jail breaking is held, in State v. Hurley (Vt.) 6 L. R. A. (N. S.) 804, not to render him guilty of an attempt to break jail.

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